Docket for 04-637

(8)

No. 04-637
Title: Margaret Bradshaw, Warden, Petitioner
v.
John David Stumpf
Docketed: November 10, 2004
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (01-3613)
Decision Date: April 28, 2004
Rehearing Denied: August 9, 2004
Questions Presented

Date	Proceedings and Orders
Nov 8 2004	Petition for a writ of certiorari filed. (Response due December 10, 2004)
Nov 8 2004	Appendix of Betty Mitchell, Warden filed.
Dec 10 2004	Brief of respondent John David Stumpf in opposition filed.
Dec 10 2004	Motion for leave to proceed in forma pauperis filed by respondent.
Dec 20 2004	Reply of petitioner Betty Mitchell, Warden filed. (Distributed)
Dec 22 2004	DISTRIBUTED for Conference of January 7, 2005.
Jan 7 2005	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 7 2005	Petition GRANTED.
Jan 10 2005	Motion to appoint counsel filed by respondent.
Jan 26 2005	Motion DISTRIBUTED for Conference of February 18, 2005.
Feb 22 2005	Motion to appoint counsel filed by respondent GRANTED. Alan M. Freedman, Esquire, of Evanston, Illinois is appointed to serve as counsel for the respondent in this case.
Feb 22 2005	Brief of petitioner Betty Mitchell, Warden filed.
Feb 22 2005	SET FOR ARGUMENT ON Tuesday, April 19, 2005.
Feb 22 2005	Joint appendix filed.
Mar 11 2005	CIRCULATED.
Mar 14 2005	Record received from U.S.C.A. for the 6th Circuit. U.S.D.C. record included (4 boxes)
Mar 21 2005	Brief of respondent in opposition filed.(Distributed.)
Mar 23 2005	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Apr 11 2005	Reply of petitioner filed. (Distributed)
Apr 19 2005	Argued. For petitioner: Douglas R. Cole, State Solicitor, Columbus, Ohio. For respondent: Alan M. Freedman, Evanston, Ill. (Appointed by this Court.)

Supreme Court, U.S.
FILED

04 637 NOV 8 - 2004

NO.

IN THE SUPREME COURT OF THE UNITED STATES

BETTY MITCHELL, Warden, *Petitioner*,

v.

JOHN DAVID STUMPF, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
*Counsel of Record
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

1. Is a representation on the record from defendant's counsel and/or the defendant that defense counsel has explained the elements of the charge to the defendant, sufficient to show the voluntariness of the guilty plea under *Henderson v. Morgan*, 426 U.S. 637, 647 (1976)?

2. Does the Due Process Clause require that a defendant's guilty plea be vacated when the State subsequently prosecutes another person in connection with the crime and allegedly presents evidence at the second defendant's trial that is inconsistent with the first defendant's guilt?

LIST OF PARTIES

The Petitioner is Betty Mitchell, the Warden of the Mansfield (Ohio) Correctional Institution.

The Respondent is John David Stumpf, an inmate of Mansfield Correctional Institution.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 3

STATEMENT OF THE CASE AND FACTS 5

REASONS FOR GRANTING THE WRIT 10

The Sixth Circuit in this case has rendered a decision of broad importance which conflicts with decisions of other federal circuits, and which expands federal habeas corpus to permit vacating a guilty plea when new and different evidence is presented at the subsequent trial of a codefendant 10

A. The Sixth Circuit's decision holding Stumpf's guilty plea involuntary conflicts with this Court's decision in *Henderson v. Morgan*, and with decisions of the Eighth and Tenth Circuits 12

B. The Sixth Circuit's holding that the subsequent "inconsistent" prosecution of Stumpf's codefendant rendered Stumpf's conviction entered on his guilty plea unconstitutional, conflicts with decisions of this Court 18

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Cases

Allen v. Mullin,
368 F.3d 1220 (10th Cir. 2004) 13, 14

Baker v. Estelle,
715 F.2d 1031 (5th Cir. 1983) 23

Bousley v. United States,
523 U.S. 614 (1998) 26

Clay v. Bowersox,
367 F.3d 993 (8th Cir. 2004) 20

Drake v. Kemp,
762 F.2d 1449 (11th Cir. 1985) 20

Gaddy v. Linahan,
780 F.2d 935 (11th Cir. 1986) 4, 16

Gregory v. Solem,
774 F.2d 309 (8th Cir. 1985) 13, 14

Gregory v. State,
353 N.W.2d 777 (S.D. 1984) 17

Henderson v. Morgan,
426 U.S. 637 (1976) ..... *passim*

Herrera v. Collins,
506 U.S. 390 (1993) 10, 25, 26

Jacobs v. Scott,
31 F.3d 1319 (5th Cir. 1994),
cert denied, 513 U.S. 1067 (1995) 21

Page

Marshall v. Lonberger,
459 U.S. 422 (1983) ..... *passim*

McGuirk v. Fair,
622 F.2d 597 (1st Cir. 1980) 13

Mooney v. Holohan,
294 U.S. 103 (1935) 19

Moore v. Armontrout,
928 F.2d 288 (8th Cir. 1991) 13, 14

Napue v. Illinois,
360 U.S. 264 (1959) 19

Nash v. Israel,
707 F.2d 298 (7th Cir. 1983) 15

Nguyen v. Lindsey,
232 F.3d 1236 (9th Cir. 2000) 20

Nichols v. Scott,
69 F.3d 1255 (5th Cir. 1995) 21

North Carolina v. Alford,
400 U.S. 25 (1970) 23

People v. Fuller,
205 Ill. 2d 308 (2002) 17

Shaw v. Terhune,
353 F.3d 697 (9th Cir. 2003) 22

Shaw v. Terhune,
380 F.3d 473 (9th Cir. 2004) 21, 22

Page

Ex Parte Smith,
548 So. 2d 1050 (Ala. 1989) 17

Smith v. Groose,
205 F.3d 1045 (8th Cir. 2000) 9, 19, 21, 22

Sparks v. State,
338 So. 2d 550 (Fla. 1st Dist. Ct. App. 1976) 17

State ex rel. Collins v. Superior Court,
157 Ariz. 71, 754 P.2d 1346 (1988) 17

State v. Fitzpatrick,
102 Ohio St. 3d 321 (2004) 17

State v. Lopez,
269 Conn. 799 (2004) 17

State v. Stumpf,
32 Ohio St. 3d 95 (1987) ..... *passim*

Stumpf v. Mitchell,
367 F.3d 594 (6th Cir. 2004) ..... *passim*

Stumpf v. Ohio,
484 U.S. 1079 (1988) 8

Sumner v. Mata,
449 U.S. 539 (1981) 14

Thompson v. Calderon,
120 F.3d 1045 (9th Cir. 1997)
vacated on other grounds, 523 U.S. 538 ..... 20, 25

Page

Turner v. Louisiana,
379 U.S. 466 (1965) 23

United States v. Dickerson,
248 F.3d 1036 (11th Cir. 2001) 20, 21

United States v. Higgs,
353 F.3d 281 (4th Cir. 2003) 21

United States v. Kattar,
840 F.2d 118 (1st Cir. 1988) 21

United States v. O'Dell,
805 F.2d 637 (6th Cir. 1986) 10

United States v. Ruiz,
536 U.S. 622 (2002) 18, 26

United States v. Sharpe,
193 F.3d 852 (5th Cir. 1999) 25

Wharton v. Anderson,
270 Ga. 22 (1998) 17

STATUTES

Ohio Revised Code 2945.06 23

28 U.S.C. 1254(1) 2

IN THE SUPREME COURT OF THE UNITED STATES

BETTY MITCHELL, Warden, *Petitioner*,

v.

JOHN DAVID STUMPF, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Betty Mitchell, Warden of the Mansfield Correctional Institution, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A, at 1a-58a. The United States District Court's unreported opinion and judgment denying the writ appear at Appendix C, at 61a-91a. The District Court's order denying Stumpf's motion to alter or amend judgment appears at Appendix D, at 92a-103a. The District Court's order granting a certificate of appealability appears at Appendix E, at 104a-120a. The Ohio Supreme Court's entry denying jurisdiction of Stumpf's motion for postconviction relief appears at Appendix O, at 235a, the opinion and judgment of the Ohio Fifth District Court of Appeals affirming the denial of Stumpf's motion for postconviction relief appears at Appendix N, at 227a-234a, and the trial court order denying

Stumpf's motion for postconviction relief appears at Appendix Q, at 237a-241a. The Supreme Court of Ohio's published decision and order on direct appeal appear at Appendix G, at 149a-177a. The opinion of the Ohio Fifth District Court of Appeals on direct appeal appears at Appendix J, at 180a-214a. The trial court's entry denying Stumpf's motion to withdraw his guilty plea appears at Appendix V, at 280a, the trial court's judgment on sentencing appears at Appendix L, at 217a-221a, the trial court's order accepting Stumpf's guilty plea appears at Appendix M, at 222a-226a, and the trial court's judgment entry finding Stumpf guilty of aggravated murder appears at Appendix K, at 215a-216a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its opinion on April 28, 2004. The Sixth Circuit denied the Warden's Petition for Rehearing and Suggestion for Rehearing En Banc on August 9, 2004. This Petition for Writ of Certiorari follows within 90 days of the Sixth Circuit's denial of rehearing. The Warden invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case turns on the Due Process Clause of the Fourteenth Amendment, and on the Fifth and Sixth Amendments to the United States Constitution.

The Due Process Clause of the Fourteenth Amendment provides:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

The Fifth Amendment provides, in relevant part:

[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . .

The Sixth Amendment provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .; [and] to be confronted with the witnesses against him . . .

INTRODUCTION

This case presents two issues of vital importance to the federal habeas review of the thousands of state convictions each year that are based on guilty pleas. In particular, the decision below adopted two unprecedented propositions of law that dramatically undercut the finality of such pleas. Together, these two propositions create a wholesale change in the legal landscape surrounding guilty pleas that warrants immediate review by this Court.

First, the court below exacerbated an existing conflict regarding the standards that apply to a defendant's claim that his plea was not voluntary because he was not informed of the elements of his crime. In *Henderson v. Morgan*, 426 U.S. 637, 646-47 (1976), this Court noted that, absent a specific factual finding that an element was not explained, it is typically appropriate to presume adequate explanation, even absent an express representation on the record that such explanation occurred. See also *Marshall v. Lonberger*, 459 U.S. 422, 437 (1983) ("Under *Henderson*, respondent must be presumed to have been informed, either by his lawyers or at one of the presentencing proceedings, of the charges on which he was indicted."). And, at least two circuits, the

Eighth and the Tenth, have concluded that, under *Henderson*, where counsel and/or the defendant had expressly represented to the state trial court that such an explanation occurred, the petitioner could not demonstrate that a plea was involuntary.

Two other circuits, however, including the Sixth Circuit in the decision below, have adopted a contrary approach. Here, for example, in a 2-1 decision over a vigorous dissent from Judge Boggs, the panel majority concluded that Stumpf's guilty plea was not voluntary. It did so despite the undisputed facts that the state trial court judge had specifically asked both Stumpf and his defense counsel whether counsel had explained the elements of the crime, and that both Stumpf and his counsel had answered yes. A case from the Eleventh Circuit has similarly rejected the view that a representation on the record by the defendant and defense counsel that the defendant understood the charge against him suffices to demonstrate voluntariness. See *Gaddy v. Linahan*, 780 F.2d 935, 945 (11th Cir. 1986) (". . . [C]onclusory responses by a defendant and his counsel to a court's inquiry into whether the defendant "understands" the charge is not sufficient to establish that the defendant actually has knowledge and understanding, particularly when he possesses minimal intelligence."). These decisions cannot be squared with *Henderson*, or its interpretation in the Eighth and Tenth Circuits. And, left uncorrected, they threaten to undermine the finality of state court guilty pleas.

The court below also worked one more important change to the ground rules for federal review of state convictions based on guilty pleas. In particular, the court—again over Judge Boggs' dissent—created a federal due process rule invalidating a petitioner's conviction if the petitioner can demonstrate that the State later presented evidence at a co-defendant's trial that is arguably inconsistent with the version of facts on which the petitioner's guilty plea

was based. Moreover, it concluded that this newly-discovered due process principle requires the earlier conviction to be vacated, even though the evidence presented at the co-defendant's trial was not known at the time the guilty plea was made and accepted. That is, the later-discovered evidence somehow transforms the previously valid guilty plea into an invalid plea. But no federal court of appeals—save the Sixth Circuit in the decision below—has ever recognized a federal right to collaterally attack a first defendant's conviction entered on a guilty plea merely because subsequently-discovered evidence is presented at a codefendant's later trial. The decision below is thus an unprecedented expansion of the grounds on which federal courts can set aside state court guilty pleas. This case presents an ideal vehicle for addressing this important issue.

The court below independently relied on each of these two propositions in granting relief to the petitioner. Thus, the State acknowledges that in order to ultimately prevail, it must establish that the court below erred on both. The court in fact did. But, in any event, this case warrants review because both of the propositions conflict with the holdings of this Court, and of other circuit courts, and each proposition carries dramatic consequences for the finality of state court convictions based on guilty pleas. The State accordingly urges this Court to grant review.

STATEMENT OF THE CASE AND FACTS

In May 1984, the Grand Jury for Guernsey County, Ohio, indicted John David Stumpf ("Stumpf") for the murder of Mary Jane Stout and the attempted murder of Norman Stout, and three other charges. The indictment included aggravating circumstances, making Stumpf eligible for the death penalty. See *State v. Stumpf*, 32 Ohio St. 3d 95, 97 (1987), at Appendix 153a.

As detailed in the Ohio Supreme Court opinion, Stumpf shot both Mary Jane Stout and Norman Stout, her husband, during the course of robbing the Stout's home. Mr. Stout survived two gunshot wounds to the head and testified at the factual basis hearing held in connection with Stumpf's plea. According to Mr. Stout, Stumpf and a codefendant, Wesley, gained entrance to the Stout's home by asking to use the telephone. Mr. Stout further testified that Stumpf forced Stout and his wife at gunpoint into a bedroom and then shot Stout between the eyes with a chrome-plated .25 caliber Raven automatic. Mrs. Stout was shot and killed after her husband was unconscious, and thus Stout did not see who shot her. *See State v. Stumpf*, 32 Ohio St.3d at 96, at Appendix 150a-151a.

On September 17, 1984, Stumpf pled guilty to aggravated murder and to the aggravating circumstance of killing Mrs. Stout to prevent her from testifying as a witness. Stumpf also pled guilty to the attempted aggravated murder of Norman Stout. In exchange for Stumpf's guilty pleas, the prosecutor agreed to drop two other specifications to the aggravated murder charge and the three other charges in the indictment. 32 Ohio St. 3d at 97, at Appendix 153a; Judgment Entry on Guilty Plea, at Appendix 222a-226a.

Consistent with Ohio law, the trial court questioned Stumpf concerning his understanding of the plea and the nature of the charged offenses. Stumpf's counsel told the trial court that "they have fully investigated the facts and law in this case and have informed the Defendant of all defenses available to him, and have further informed the Defendant of the nature of the offense of 'AGGRAVATED MURDER' as charged in the First Count[.]" Trial Court Judgment Accepting Guilty Plea, at Appendix 223a. The trial court asked defense counsel if they had informed Stumpf of the elements of the offenses with which he was charged, and the defense counsel responded affirmatively. Plea Hearing

Transcript, at Appendix 248a. Stumpf also affirmed for the trial court that his lawyers had so advised him. Plea Hearing Transcript, at Appendix 250a. The trial court accepted Stumpf's plea.

After a full mitigation hearing, the trial court sentenced Stumpf to death. Sentencing Opinion, at Appendix 217a. During that hearing, Stumpf admitted that he participated in the robbery of the Stouts' home and that he shot Norman Stout, but Stumpf claimed that the other participant in the robbery, Wesley, had shot Mary Jane Stout. 32 Ohio St. 3d at 97, at Appendix 154a.

Several months after Stumpf's conviction and sentencing, Wesley's cellmate offered to testify at Wesley's trial that Wesley admitted that he, not Stumpf, had shot Mary Jane Stout. It is uncontested that the cellmate first heard this supposed admission, and that the State first learned of it, after Stumpf's conviction. Transcript of Hearing on Motion to Withdraw Guilty Plea, at Appendix 270a-272a, 276a. At Wesley's trial, the jailhouse informant did in fact testify that Wesley told him that he had shot Mrs. Stout. 32 Ohio St. 3d at 104, at Appendix 169a-170a.

On June 7, 1985, approximately eight and a half months after his conviction was final, Stumpf filed a motion to withdraw his guilty plea in the trial court. Motion to Withdraw Plea, at Appendix 266a-268a. In this motion, Stumpf did not claim that he did not understand the elements of the offense to which he pled guilty. Instead, Stumpf sought to vacate his plea based on the fact that the State had presented evidence at Wesley's trial that it was Wesley, not Stumpf, who shot Mrs. Stout. On October 7, 1985, after reviewing both the jailhouse informant's and Wesley's testimony from Wesley's trial, the trial court denied Stumpf's motion. Judgment Entry, at Appendix 280a; see also

Transcript of Hearing on Motion to Vacate Plea, at Appendix 269a; *Stumpf v. Mitchell*, 367 F.3d 594, 617 (6th Cir. 2004), at Appendix 46a.

Stumpf filed a supplemental brief in the Fifth District Court of Appeals, raising his claims regarding the motion to withdraw his plea. The Fifth District Court of Appeals affirmed his conviction and the denial of his motion to vacate his guilty plea. See Appendix 201a-205a. Stumpf appealed to the Ohio Supreme Court. Both the Ohio appellate court and the Ohio Supreme Court rejected Stumpf's arguments. See *State v. Stumpf*, 32 Ohio St.3d at 98-108, at Appendix 156a-177a. In so doing, the Ohio Supreme Court expressly stated that Stumpf did not "claim that his plea was not entered knowingly, intelligently, and voluntarily." *Id.* at 106, at Appendix 170a. This Court denied certiorari. *Stumpf v. Ohio*, 484 U.S. 1079 (1988), at Appendix 178a-179a.

Stumpf further challenged his guilty plea with a state post-conviction action. The Ohio courts rejected his claims. See Appendix 227a-241a. This Court again denied certiorari. *Stumpf v. Ohio*, 502 U.S. 956 (1991), at Appendix 236a.

Stumpf then filed a petition for a writ of habeas corpus in federal District Court. In his Second Claim for Relief, Stumpf asserted that his guilty plea was not knowing, intelligent and voluntary because his attorneys told him that he could not be sentenced to death if he pled guilty. The District Court rejected this claim on the merits on February 7, 2001. See Appendix 62a-74a.

In Stumpf's Seventh Claim for Relief, he argued that he should have been granted a new trial because of the later-discovered evidence that his separately tried co-defendant, Wesley, was actually the shooter. Apparently, the District Court sua sponte raised the question whether the State's failure to allow Stumpf to withdraw his plea violated his right

to due process, insofar as the state prosecuted Stumpf's codefendant based on an "inconsistent theory." The District Court ultimately held that Stumpf's due process rights were not violated. See Appendix 85a-87a.

Stumpf appealed to the Sixth Circuit. There, Stumpf continued to claim that his guilty plea was invalid because (1) he received no benefit from pleading guilty, and (2) his attorney incorrectly told him that he would not be eligible for the death penalty if he pled guilty. Stumpf Sixth Circuit Brief at 71. However, Stumpf conceded in his Sixth Circuit brief that "the record suggests an air of regularity and a valid plea . . ." Stumpf Sixth Circuit Brief at 67.

The Sixth Circuit, in a 2-1 opinion with a dissent from Judge Boggs, granted habeas on two independent grounds. First, the Sixth Circuit held that Stumpf's guilty plea was constitutionally involuntary because he lacked understanding of the aggravated murder charge. Second, the court concluded that the State had violated Stumpf's right to due process by convicting Wesley on evidence—evidence that came to light after Stumpf conviction and sentence became final—that was inconsistent with Stumpf's plea. 367 F.3d at 618, at Appendix 48a.

In his dissent, on the first claim, Judge Boggs disagreed with the panel majority's "extensive exegesis of the 'confusion' at the plea hearing itself," concluding that ". . . Stumpf understood his legal strategy, executed it according to plan, and got exactly the opportunities that he bargained for, making the grant of a writ of habeas corpus unwarranted." *Id.* at 622, 623, at Appendix 57a, 58a. With regard to the second (inconsistent theories) claim, Judge Boggs observed that "[h]owever flawed a defendant's guilty plea might be, it cannot constitute a contradictory prosecutorial theory of guilt as required in [*Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000)]." 367 F.3d at 621, n.2

(Boggs, C.J., dissenting), at Appendix 54a. As Judge Boggs also noted, the record does not show that the prosecutor ". . . was remiss in relying on Stumpf's acknowledgment of guilt." 367 F.3d at 620, at Appendix 52a. "At most, the *existence* of [the cellmate's] statement could be argued to have rendered the conviction [of Stumpf] unreliable, but then [the] analysis would simply be that of any newly discovered evidence, which proceeds against a more difficult background . . ." 367 F.3d at 622, at Appendix 55a-56a (Boggs, C.J., dissenting), citing *United States v. O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986), and *Herrera v. Collins*, 506 U.S. 390, 400 (1993). As Judge Boggs noted, "[i]t would indeed be bizarre if [the cellmate's] statement could not undermine Stumpf's conviction by its own force, but introducing it into another proceeding could do so." 367 F.3d at 622, at Appendix 55a-56a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit in this case has rendered a decision of broad importance which conflicts with decisions of other federal circuits, and which expands federal habeas corpus to permit vacating a guilty plea when new and different evidence is presented at the subsequent trial of a codefendant.

The Sixth Circuit decision below adopted two propositions of law that significantly expand the grounds for collaterally attacking in federal habeas proceedings state criminal convictions entered on pleas of guilty. The Sixth Circuit panel majority's new rules of constitutional law concerning the validity of guilty pleas warrant immediate review by this Court.

First, the decision below deepened an existing split regarding the standards that apply to a defendant's claim that his plea was not voluntary because he was not advised of the elements of the crime to which he pled guilty. At least two circuits have concluded under *Henderson v. Morgan*, above, that where counsel or the defendant represented on the record that counsel advised the defendant of the elements of the crime, the defendant failed to demonstrate that his plea was involuntary. But the Sixth Circuit below adopted a contrary approach. Despite Stumpf's and his defense counsel's affirmation to the trial court that counsel duly explained to Stumpf the elements of the crime with which he was charged, the court below determined Stumpf's plea was involuntary based on statements by Stumpf's counsel at the plea and factual basis hearings contesting that Stumpf actually fired the shots that killed the victim. This case accordingly presents the important issue of whether, consistent with *Henderson* and *Lonberger*, above, express affirmations on the record that defense counsel has advised the defendant of the elements of the crime satisfies the State's obligation to demonstrate that a guilty plea is voluntary.

Second, the decision below also created a federal due process rule invalidating a petitioner's conviction if he can demonstrate that the State later presented evidence at a codefendant's trial that is arguably inconsistent with the version of the facts on which the petitioner's guilty plea was based. The court below applied this principle even though the different evidence presented at the codefendant's trial was not known at the time the plea was entered. In doing so, the court dramatically expanded the ground on which petitioners can attack a first defendant's conviction entered on a guilty plea based on later-discovered evidence presented at a codefendant's subsequent trial. Because the decision below has wide-ranging implications for state convictions entered on guilty pleas, the Court should review the decision below.

A. The Sixth Circuit's decision holding Stumpf's guilty plea involuntary conflicts with this Court's decision in *Henderson v. Morgan*, and with decisions of the Eighth and Tenth Circuits.

The Sixth Circuit's decision below deepened an existing conflict regarding the standards that apply to a claim that a guilty plea was involuntary because the petitioner was not advised of the elements of the crime. That conflict implicates the standards that apply to the thousands of state convictions every year entered on guilty pleas. The conflict arises out of the proper interpretation of *Henderson v. Morgan*, 426 U.S. 637 (1976), and the standard for determining when the record of a plea hearing sufficiently supports the presumption that a defendant has been advised of the elements of the crime so that his guilty plea is voluntary.

In *Henderson v. Morgan*, 426 U.S. at 646-47, this Court considered the claim of a defendant, who had been charged with first degree murder, that his guilty plea to second degree murder was involuntary because he was not aware that intent to cause death was an element of the offense. In that case, the district court hearing the habeas petition specifically found that the defendant had not been advised about the intent element before he pled guilty. In sustaining the claim, the Court observed:

> Normally, the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of

> the offense in sufficient detail to give the accused notice of what he is being asked to admit. This case is unique because the trial judge found as a fact that the element of intent was not explained to respondent . . .

Henderson v. Morgan, 426 U.S. at 646-647. See also *Marshall v. Lonberger*, 459 U.S. at 437 (rejecting challenge to validity of previous state court guilty plea; despite defendant's testimony in state court that he did not understand when he entered his plea that he was pleading guilty to attempted murder, state trial court implicitly found that testimony not credible) ("Under *Henderson*, respondent must be presumed to have been informed, either by his lawyers or at one of the sentencing proceedings, of the charges on which he was indicted.").

Consistent with *Henderson*, federal appellate court decisions have regarded the Court's decision in that case as limited to its "unique" facts in which the trial court found as fact that the defendant had not been advised that intent to kill was an element of the offense to which he pled guilty. See *Allen v. Mullin*, 368 F. 3d 1220, 1241 (10th Cir. 2004) ("[t]he narrowness of the Court's holding is evidenced by this passage in its opinion"), citing *Henderson*, 426 U.S. at 647; *Moore v. Armontrout*, 928 F.2d 288, 292 (8th Cir. 1991) ("We have previously refused to interpret *Henderson* broadly and refuse to do so here."); *Gregory v. Solem*, 774 F.2d 309, 315 (8th Cir. 1985) ("As Justice Stevens pointed out, the facts in *Henderson* were 'unique' because the state trial judge 'found as a fact the element of intent was not explained to the respondent'"); *McGuirk v. Fair*, 622 F.2d 597, 598 (1st Cir. 1980) ("The holding of *Henderson* was very narrow, however, and its facts are distinguishable from those of the instant case.").

Accordingly, the Eighth and Tenth Circuits have rejected federal habeas corpus claims to invalidate a conviction entered on a guilty plea where the state trial court record included express representations by counsel and/or the defendant that the defendant had been advised of the nature of the charge or the elements of the crime. In these cases, the circuits faced the common fact pattern where a defendant (and/or his counsel) confirms on the record of the plea hearing that counsel has explained the charge to the defendant, the plea is entered, and some time later, after the conviction is final, the defendant claims that he did not understand the charge. In *Allen v. Mullin*, 368 F. 3d at 1228, 1241-43, the Tenth Circuit held that the petitioner failed to overcome the *Henderson* presumption that he was informed by counsel of the intent element of the charged offense. There, Allen was charged by an information that recited the offense, including the intent element, Allen submitted a factual basis affidavit stating that he killed the victim without cause, and at the plea hearing, and Allen and his attorney assured the court that Allen had reviewed the charges with his counsel. *Allen*, 368 F.3d at 1242.

In *Moore v. Armontrout*, 928 F.2d at 292, the Eighth Circuit similarly rejected a challenge to the voluntariness of a guilty plea, noting that at Moore's guilty plea hearing, the charges were read to him and he responded affirmatively when asked if he had discussed the charges with his attorney. And, in *Gregory v. Solem*, 774 F.2d at 315, the Eighth Circuit held that the finding by the state court that Gregory understood the nature of the offense showed that his guilty plea was voluntary, and that the *Henderson* presumption that counsel explained the charge to him supported that finding, which, under *Sumner v. Mata*, 449 U.S. 539 (1981), was entitled to a "high measure of deference." These cases are consistent with the observation in *Henderson* (and *Lonberger*) that either an express representation by defense counsel on the record that the nature of the offense has been

explained to the defendant, or a presumption that counsel has done so, ordinarily suffices to show that the accused has sufficient information about what he is being asked to admit to render the plea voluntary. See *Henderson*, 426 U.S. at 646-47.

By contrast, the Sixth Circuit held that Stumpf's protestations that he did not actually kill Mrs. Stout required the state to show with extrinsic evidence in federal habeas corpus that Stumpf truly understood that specific intent was an element of the charge of aggravated murder. *Stumpf v. Mitchell*, 367 F. 3d 594, 608-610, at Appendix 30a (". . . [W]hen the state court record of a defendant's plea does not demonstrate that the plea is constitutionally adequate, the state bears the burden of showing the plea was voluntary, knowing and intelligent. Here, the state has presented no extrinsic evidence to counter the record of the proceedings discussed above."); *id.* at 607-08, at Appendix 28a (noting that although representations on the record by defense counsel that he advised the defendant of the elements of the crime typically suffice to show voluntariness of the plea, "[i]n this case, however, the record clearly establishes that Stumpf sought to preserve his right to argue that he was not the shooter and thus counterbalances the assurances given by defense counsel that they had explained the elements to Stumpf."); cf. *id.* at 623 (Boggs, C.J., dissenting).[1] The Sixth Circuit so held despite the Ohio Supreme Court's finding that Stumpf made *no* claim on appeal "that his plea was not entered knowingly, intelligently, and voluntarily," *State v. Stumpf*, 32 Ohio St. 3d at 104, at Appendix 170a, and despite the failure of Stumpf's counsel to make such a claim

[1] Cf. *Nash v. Israel*, 707 F.2d 298, 302-03 (7th Cir. 1983) (holding that defendant's guilty plea was not voluntary when he told the judge, when asked, that the charges had been explained to him, but he did not understand them) ("[W] e are presented with a case in which the intent element was not explained to Nash ... *after he explicitly stated that he did not understand the charge.*")(emphasis supplied).

"explicitly" in federal habeas corpus. See 367 F.3d at 600, at Appendix 12a ('Although Stumpf does not contend explicitly that his guilty plea was invalid because he was not aware that specific intent was an element of the crime to which he pleaded guilty . . .").

The Sixth Circuit's approach in *Stumpf* is similar to the ruling of the Eleventh Circuit in *Gaddy v. Linahan*, 780 F.2d 935, 944 n.10, 945 (11th Cir. 1986). The court in *Gaddy* remanded a habeas corpus claim for an evidentiary hearing on what, if any, information the petitioner received and understood, before pleading guilty, regarding the elements of malice murder, to which he pled guilty. While there was no express representation on the record of the plea hearing that defense counsel had advised Gaddy of the elements of the crime, 780 F.2d at 944, n.10, the prosecutor read the indictment to him at the plea hearing, and the defense counsel and Gaddy responded affirmatively when the trial court asked if Gaddy understood the charge. The court in *Gaddy* opined that conclusory affirmative responses by a defendant and his counsel to a court's inquiry into whether the defendant "understands" the charge are not sufficient to establish the defendant's actual knowledge and understanding, particularly when he possesses minimal intelligence. 780 F.2d at 945. In both *Stumpf* and *Gaddy*, the circuit courts disregarded the representations on the record of the plea hearing to the effect that the defendant had been advised of, or understood, the charge against him, to question the voluntariness of their guilty pleas.

The questions presented by these cases are: (1) under *Henderson*, 426 U.S. at 647, if the plea hearing record reflects a representation that the defense counsel explained the elements of the offense and/or any possible defenses, whether the burden ever shifts to the State to show that the defendant knowingly and voluntarily pled guilty; and (2) if so, whether a mere ambiguity in the plea colloquy is enough

to shift the burden to the State to prove by extrinsic evidence that the defendant actually understood the elements of the charged crime.

The Sixth and Eleventh Circuits' shifting of the burden of proof to the State runs counter to the generally narrow interpretation of *Henderson* by other circuits, and starkly conflicts with decisions by the Eighth and Tenth Circuits that require the habeas corpus petitioner to overcome the presumption that counsel fully explained the elements of the charged offense. The panel majority's decision in *Stumpf* also conflicts with the decisions of other State appellate courts relying upon the *Henderson* presumption, with or without an affirmation by the defendant and defense counsel on the plea hearing record that defense counsel explained the nature of the charges to the defendant. See, e.g., *State v. Fitzpatrick*, 102 Ohio St. 3d 321, 329 (2004) ("Moreover, the Constitution does not require that a trial court explain the elements of the charge, at least where the record contains a representation by defense counsel that the nature of the offense has been explained to the accused.")(citations omitted). In *Fitzpatrick*, the defense counsel affirmed that they had explained the charged offenses to him, and Fitzpatrick affirmed that he had spoken with his counsel and that he understood the charge. Fitzpatrick's statement at the sentencing hearing that he would not knowingly hurt the victims was insufficient to undermine the voluntariness of his guilty plea. *Id.* at 330. See also, e.g., *Ex Parte Smith*, 548 So.2d 1050, 1051-53 (Ala. 1989); *State ex rel. Collins v. Superior Court*, 157 Ariz. 71, 754 P.2d 1346, 1348 (1988); *State v. Lopez*, 269 Conn. 799, 801-02 (2004); *Wharton v. Anderson*, 270 Ga. 22, 23 (1998); *Gregory v. State*, 353 N.W.2d 777, 780-81 (S.D. 1984); *Sparks v. State*, 338 So.2d 550, 552 (Fla. 1st Dist. Ct. App. 1976); see also *People v. Fuller*, 205 Ill. 2d 308, 328 (2002) ("Given that the defendant's allegation to the contrary is *de hors* the record and was not properly raised or resolved in a post-

plea proceeding, the defendant has not overcome the presumption that counsel properly informed the defendant of the elements necessary to make him death eligible.").

In sum, review is warranted here because the Sixth Circuit's holding that Stumpf's guilty plea was involuntary directly conflicts with decisions of the Eighth and Tenth Circuits and the decisions of many State appellate courts.

B. The Sixth Circuit's holding that the subsequent "inconsistent" prosecution of Stumpf's codefendant rendered Stumpf's conviction entered on his guilty plea unconstitutional, conflicts with decisions of this Court.

This Court has held that there is no due process violation where the prosecution fails to provide "inconsistent" evidence prior to the entry of a guilty plea. *United States v. Ruiz*, 536 U.S. 622, 631 (2002) (rejecting claim of constitutional obligation to provide impeachment evidence during plea bargaining process). If a conviction may not be set aside because impeachment evidence was not provided to the defendant before entering a guilty plea, then there can be no right to have evidence that is not yet in existence considered at the plea and sentencing hearings. This is not a case in which the alleged misconduct of the State calls into question the fundamental fairness of the conduct of Stumpf's sentencing hearing. And, because Stumpf's claim of prosecutorial "misconduct" or "inconsistency" relative to *Stumpf's* conviction is based on evidence that did not exist at the time of his plea and sentencing hearing, then it amounts to a claim that he has a right to have the State vacate his guilty plea to the charged offense simply because evidence later comes to light that might have been helpful to him had he gone to trial.

Notably, the Sixth Circuit held that Stumpf "clearly has a due process claim even though [the allegedly inconsistent evidence] was not available at the time of his trial." 367 F. 3d at 613, at Appendix 39a. The panel majority's holding that *Stumpf's* due process rights were violated *retroactively* by the use of newly discovered inconsistent evidence at Stumpf's codefendant's *subsequent* trial goes well beyond this Court's and other circuits' cases dealing with the prosecutor's use of false evidence at a defendant's trial. This Court has not held that inconsistent prosecution theories or evidence, as opposed to presenting testimony the prosecution knows to be false, states a claim for a due process violation of a defendant's right to a fair trial. Cf. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (prosecutor failed to correct testimony he knew to be false); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (knowing presentation of false testimony).

In granting Stumpf relief on due process grounds, the Sixth Circuit claimed to "join our sister circuits in finding that the use of inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation." *Stumpf v. Mitchell*, 367 F. 3d at 611. Yet the Sixth Circuit did not acknowledge, let alone discuss, an obviously important procedural distinction, namely, that none of the cases that it relied upon from its sister circuits concerned defendants who pled guilty at trial and later sought to withdraw their pleas based on the state's allegedly inconsistent prosecution of codefendants. See *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000) (first convicted codefendant was granted a writ of habeas corpus where his conviction and that of the second codefendant were based on inconsistent testimony of one witness as to who actually killed the victims, and the State selectively presented two

different stories from that witness at the two trials);[2] *Thompson v. Calderon*, 120 F.3d 1045, 1056, 1058-59 (9th Cir. 1997) (en banc)[3] (opining that first convicted codefendant was denied due process at his trial when State introduced testimony of one jailhouse informant that pointed to Thompson as killer, but State had presented different jailhouse informant's testimony at the earlier pretrial proceedings and at the subsequent trial of Thompson's codefendant, pointing to the *codefendant* as the killer), vacated on other grounds, 523 U.S. 538 (1998); *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., specially concurring)[4] (suggesting that due process rights of second codefendant were violated when State obtained conviction of first codefendant at trial on the theory that he committed the murder alone, and at the second codefendant's trial, argued that the second codefendant must have helped the first to commit the murder; judge noted that prosecutor must have obtained second codefendant's conviction based on evidence he did not believe); but cf. *United States v. Dickerson*, 248 F.3d 1036, 1043-44 (11th Cir. 2001) ("In

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[2] Cf. *Clay v. Bowersox*, 367 F.3d 993, 1004 (8th Cir. 2004) (rejecting due process claim based on allegedly contradictory prosecution theories during prosecutor's closing arguments, where evidence left open the possibility that either of the two codefendants could have been the triggerman).

[3] A majority of the judges on the Ninth Circuit en banc panel did not join in the portion of the opinion finding a due process violation. See *Thompson v. Calderon*, 120 F.3d at 1063-64 (Tashima, J., joined by Thomas, J., concurring); 120 F.3d at 1066-73 (Kozinski, J., joined by Nelson, J., dissenting). The majority opinion decided the case based on an ineffective assistance of counsel claim. 120 F.3d at 1051-56. Cf. *Nguyen v. Lindsey*, 232 F.3d 1236, 1240-41 (9th Cir. 2000) (where both defendants could be guilty of murder of bystander during gang warfare, no due process claim based on inconsistent prosecution theories).

[4] The majority in *Drake v. Kemp* decided the case on other grounds—namely, that a new trial was warranted because the burden of proof had been shifted to the defendant and the prosecutor made an improper closing argument during the sentencing phase of the trial. See 762 F.2d at 1451.

contrast, *neither the Supreme Court nor this court has addressed the constitutional implications of inconsistent litigation positions taken by the Government against defendants being tried separately for the same crime*. The [*United States v. Kattar*, 840 F.2d 118, 129 n.7 (1st Cir. 1988)] court recognized the difference between . . . the presentation of false testimony [and] . . . the Government's differing litigation positions . . .") (emphasis supplied); *United States v. Higgs*, 353 F.3d 281, 326-27 (4th Cir. 2003) (citing *Groose*, above, but noting that there was no inconsistency in the case before the court because the evidence showed that the two codefendants were equal partners in crime).

Moreover, even if the Sixth Circuit did join some of its sister circuits, in doing so it exacerbated a conflict with the Fifth Circuit. In *Nichols v. Scott*, 69 F.3d 1255, 1268-69, 1273-74 (5th Cir. 1995), the Fifth Circuit rejected a due process claim based on inconsistent prosecution theories. There, both codefendants shot at the victim, but it was not clear whose bullet killed the victim. The first codefendant pled guilty and, at sentencing, the prosecution argued that he was the triggerman. Later, Nichols was tried to a jury on the theory that he was the shooter. The court held that Nichols—the second-tried defendant—had no due process claim because the evidence presented at Nichols's trial was not factually false, and the State's argument at sentencing that Nichols fatally shot the victim did not affect the reliability of Nichols' trial. Under Texas law, both defendants could be convicted and sentenced to death for their participation in the robbery and murder of the victim. Accord, *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994) (the first-tried codefendant, Jacobs, was not deprived of due process when the prosecution stated in the second codefendant's trial that based on further investigation, the State no longer believed that Jacobs—the first codefendant—was the triggerman), *cert. denied*, 513 U.S. 1067 (1995). See also *Shaw v.*

Terhune, 380 F.3d 473, 475 (9th Cir. 2004) (new opinion on rehearing)[5] (not reaching issue of whether prosecution's use, at the separate trials of two codefendants, of inconsistent theories about the identity of the robber who held bystander at gunpoint violated the first-tried defendant's due process rights; court held that *assuming* it could be a due process violation, the use of inconsistent theories did not entitle first defendant to writ of habeas corpus because there was sufficient evidence upon which the jury could have convicted Shaw without implicating the inconsistent theories).

In short, the circuits are inconsistent in their treatment of inconsistent theories. That split merits this Court's review. Review is particularly warranted here because the Sixth Circuit panel below created a right to vacate a guilty plea not only when there is inconsistency, but even when that "inconsistency" arises solely from newly discovered evidence that was not available at the time the plea-based conviction became final.

As the dissenting judge on the Sixth Circuit panel observed, "[h]owever flawed a defendant's guilty plea might be, it cannot constitute a contradictory prosecutorial theory of guilt as required in *Groose*." 367 F.3d at 621, n.2 (Boggs, C.J., dissenting), at Appendix 54a. As the dissenting judge also noted, the record does not show that the prosecutor ". . . was remiss in relying on Stumpf's acknowledgment of guilt." 367 F.3d at 620, at Appendix 52a. Simply stated, the

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[5] The dissenting Sixth Circuit judge in *Stumpf* relied upon an earlier opinion in *Shaw v. Terhune*, above, which concluded that the facts stated showed no due process violation. See 367 F.3d at 621, at Appendix 54a (Boggs, J., dissenting), citing *Shaw v. Terhune*, 353 F.3d 697 (9th Cir. 2003), opinion withdrawn by 2003 U.S. App. LEXIS 27901 (9th Cir., Aug. 10, 2004). The Ninth Circuit panel in *Shaw v. Terhune* withdrew its earlier opinion when that panel issued its decision on rehearing on August 10, 2004. See 2003 U.S. App. LEXIS 25895.

newly discovered evidence did not undermine confidence in the correctness of Stumpf's conviction based on *his guilty plea*.

Because the due process right that the Sixth Circuit posited in this case arises out of a defendant's right to a fair trial, see, e.g., *Turner v. Louisiana*, 379 U.S. 466, 471-72 (1965), it is not readily applied to a claim seeking to vacate a guilty plea, which is an "admission that [the accused] committed the crime charged against him," see *North Carolina v. Alford*, 400 U.S. 25, 32 (1970). A trial involves the jury's (or judge's) evaluating the prosecutor's theory of the case based on the evidence presented. If a prosecutor who has the same evidence at hand deliberately presents one version of the facts in one codefendant's trial, and presents a diametrically opposed version of the facts in the second codefendant's trial (i.e., not based on any newly discovered evidence), it may arguably mislead the finder of fact, at least in the second case. By contrast, ordinarily there is no "trial" when a court accepts a defendant's guilty plea, which admits that the defendant committed the crime charged. The Sixth Circuit panel majority's decision creates a right of a convicted defendant to set aside his guilty plea when he can show that the prosecution obtained a conviction of a codefendant at trial by relying on evidence that was "inconsistent" with the factual basis for the first defendant's guilty plea.[6]

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[6] Although under Ohio law the State was required to produce independent evidence to corroborate Stumpf's guilty plea to aggravated, capital murder, *see* O.R.C. 2945.06, there is no decision of this Court or any other federal court of appeals that such a requirement is a basic element of due process. *See Baker v. Estelle*, 715 F.2d 1031, 1036 (5th Cir. 1983) (no federal constitutional question raised by trial court's alleged failure to comply with state statute that required evidence to corroborate guilty plea).

Stumpf was convicted on his own guilty plea, not on any "false" evidence. At most, there are two versions of what happened on the day of the murder and which of the two codefendants, Stumpf or Wesley actually fired the shots that killed Mrs. Stout. Those are: Stumpf's version (where Stumpf shot Mr. Stout, swapped guns with Wesley, and Wesley shot Mrs. Stout with Stumpf's gun) and the codefendant Wesley's story (where Stumpf did all of the shooting). The sentencing panel heard Stumpf's version of events (and the ballistics evidence which showed that Stumpf's gun was the murder weapon), and rejected Stumpf's version of the facts. And, during the later hearing on Stumpf's motion to vacate his plea, that same panel (minus the judge who had died since Stumpf's sentencing hearing) also had before it the transcript of Stumpf's codefendant's cellmate at the codefendant's trial—the newly-discovered evidence on which Stumpf relied in seeking to vacate his plea. See 367 F.3d at 617, at Appendix 46a. That panel of judges nevertheless rejected Stumpf's request to vacate his plea, and so apparently were not persuaded that the newly discovered evidence cast doubt on the validity of Stumpf's conviction and sentence.

The Sixth Circuit panel majority's decision, holding that presenting at a second codefendant's trial newly discovered evidence inconsistent with the first codefendant's hearing on the factual basis for his guilty plea results in a due process violation, also effectively allows defendants convicted on a guilty plea to assert a (disfavored) federal habeas claim for newly discovered evidence without meeting the stricter standards for such a claim. See, e.g., 367 F.3d at 622, at Appendix 55a-56a (Boggs, dissenting) ("[a]t most, the *existence* of [the cellmate's] statement could be argued to have rendered the conviction [of Stumpf] unreliable, but then our analysis would simply be that of any newly discovered evidence, which proceeds against a more difficult background . . ."). The panel majority's approach contradicts

this Court's rule in *Herrera v. Collins*, 506 U.S. 390, 400 (1993), that habeas relief is *not* the proper remedy for a claim of judicial error based on newly discovered evidence, absent some constitutional flaw in the trial proceedings. Cf. *Thompson v. Calderon*, 120 F.3d at 1058 (recognizing that when new evidence comes to light, there can be no due process violation based on inconsistent evidence or theory of prosecution); see also *United States v. Sharpe*, 193 F.3d 852, 872 (5th Cir. 1999) (citing *Thompson*, court held that the government's changing its theory of who the triggerman was at the second trial was not a due process violation but simply represented "... the presentation of new and significant evidence that justified the prosecution in question."). As the dissenting judge on the panel noted, "[i]t would indeed be bizarre if [the cellmate's] statement could not undermine Stumpf's conviction by its own force, but introducing it into another proceeding could do so." 367 F.3d at 622, at Appendix 55a-56a. And, here, the newly discovered evidence that Stumpf relied upon in seeking to withdraw his plea did not tend to show that Stumpf was "actually innocent," because, as the Sixth Circuit admitted, the State was not required to prove that Stumpf was the actual shooter in order to convict him for aggravated murder under Ohio law. See 367 F.3d at 614, at Appendix 42a.

Finally, the Sixth Circuit's unprecedented decision expanding the grounds for collaterally attacking in federal habeas corpus state criminal convictions entered on pleas of guilty has broad potential application to convictions based on guilty pleas in non-capital cases as well as death penalty cases. *See* Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 2000, Table 4-2 (noting that ninety-five percent of state felony convictions in 2000 were entered by guilty pleas). The Sixth Circuit essentially held that Stumpf's conviction and death sentence must be set aside because Stumpf's guilty plea was "mistaken" (by virtue of Stumpf's being misinformed about the element of specific

intent before entering his plea, or of being ignorant of evidence later obtained by the State that could have aided his defense). But defendants sometimes plead guilty while professing their innocence, regardless of what they think the State must, can, or will prove, and often come to believe after-the-fact that pleading guilty was a big mistake. In granting Stumpf relief, the Sixth Circuit has "obliterate[ed] the distinction between 'involuntary' pleas and "misinformed or even uninformed" ones, and has failed to recognize that "[o]nce all those categories have been lumped together, the cases within them are not at all rare, but indeed exceedingly numerous." *Bousley v. United States*, 523 U.S. 614, 632-633 (1998) (Scalia, J., dissenting).

In the alternative, even if this Court determines not to grant certiorari to review the State's second proposition, summary reversal is warranted here. As discussed above, the Sixth Circuit's decision is not supported by the decisions of the other courts of appeals that it cites, and is inconsistent with this Court's pronouncements in *Herrera v. Collins*, above (habeas relief ordinarily is *not* the proper remedy for a claim based on newly discovered evidence), and *United States v. Ruiz*, above (rejecting claim of constitutional obligation to provide impeachment evidence during plea bargaining process).

CONCLUSION

For all of the above reasons, the Court should grant the State's petition and review the decision of the Sixth Circuit.

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
*Counsel of Record
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner

November 8, 2004

(9) Supreme Court, U.S.
FILED

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

BETTY MITCHELL, Warden, *Petitioner,*

v.

JOHN DAVID STUMPF, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE*
State Solicitor
*Counsel of Record
DIANE RICHARDS BREY
Deputy Solicitor
CHARLES L. WILLE
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

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DIANE RICHARDS BREY
Deputy Solicitor
CHARLES L. WILLE
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner

TABLE OF CONTENTS

		Page
Appendix A:	Opinion of the United States Court of Appeals for the Sixth Circuit, 367 F.3d 594 (6th Cir. 2004), April 28, 2004	1a
Appendix B:	Sixth Circuit's Decision Denying Warden's petition for rehearing and rehearing en banc, August 9, 2004	59a
Appendix C:	Opinion of the United States District Court for the Southern District of Ohio (excerpts relating to claims at issue), denying Stumpf's petition for a writ of habeas corpus, February 7, 2001	61a
Appendix D:	Opinion of the United States District Court for the Southern District of Ohio, denying Stumpf's motion to alter or amend judgment, May 1, 2001	92a
Appendix E:	Opinion and Order of the United States District Court for the Southern District of Ohio, granting Certificate of Appealability, July 12, 2001	104a
Appendix F:	Opinion of the United States District Court for the Southern District of Ohio, dismissing some of Stumpf's claims for procedural default, November 9, 1999	121a
Appendix G:	Ohio Supreme Court's published decision on direct appeal, 32 Ohio St.3d 95 (1987), August 19, 1987	149a
Appendix H:	Entry of United States Supreme Court denying Stumpf's petition for a writ of certiorari, February 22, 1988	178a
Appendix I:	Entry of United States Supreme Court denying Stumpf's petition for rehearing, April 18, 1988	179a
Appendix J:	Opinion of the Ohio Fifth District Court of Appeals on direct appeal, May 22, 1986	180a
Appendix K:	Judgment Entry finding Stumpf Guilty, September 1984	215a
Appendix L:	Separate Opinion (on Sentence of Death) by Guernsey County Court of Common Pleas, September 24, 1984	217a
Appendix M:	Judgment of Guilt, by Guernsey County Court of Common Pleas, September 20, 1984	222a
Appendix N:	Opinion of the Ohio Fifth District Court of Appeals affirming denial of Stumpf's petition for post-conviction relief, July 23, 1990	227a

Page

Appendix O: Order of the Ohio Supreme Court denying Stumpf's appeal of denial of post-conviction relief, December 26, 1990 ..... 235a

Appendix P: Entry of United States Supreme Court denying Stumpf's petition for a writ of certiorari on denial of post-conviction relief, November 12, 1991 ..... 236a

Appendix Q: Opinion of Guernsey County Common Pleas Court denying Stumpf's petition for post-conviction relief, November 27, 1989 ..... 237a

Appendix R: September 17, 1984 Transcript of hearing on Stumpf's guilty plea 242a

Appendix S: Indictment against Stumpf 261a

Appendix T: Stumpf's motion to withdraw his guilty plea, June 7, 1985 ..... 266a

Appendix U: Excerpt from October 1, 1985 transcript of hearing on Stumpf's motion to withdraw his guilty plea 269a

Appendix V: Order of the Guernsey County Court of Common Pleas denying Stumpf's motion to withdraw guilty plea, October 2, 1985 ..... 280a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3613

John David Stumpf,
Petitioner-Appellant,
v.
Betty Mitchell, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus

No. 96-00668

George C. Smith, District Judge

Argued December 11, 2002
Decided and Filed April 28, 2004

Before: BOGGS, Chief Judge; and DAUGHTREY and MOORE, Circuit Judges. DAUGHTREY, J., delivered the opinion of the court, in which MOORE, J., joined. BOGGS, C.J. (pp. 44-52), delivered a separate dissenting opinion

COUNSEL

ARGUED: Alan M. Freedman, MIDWEST CENTER FOR JUSTICE, Chicago, Illinois, for Appellant. Carol Ann Ellensohn, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellee. ON BRIEF: Alan M. Freedman, Carol Heis, MIDWEST CENTER FOR JUSTICE,

Chicago, Illinois, for Appellant. Stephen E. Maher, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

OPINION BY: MARTHA CRAIG DAUGHTREY

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. The petitioner, John David Stumpf, is a state prisoner incarcerated on Ohio's death row. He appeals the district court's dismissal of his habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, in which he challenged his 1984 guilty plea and death sentence for one count of aggravated murder, with the capital specification that the murder was committed to escape detection, apprehension, trial, and punishment for other offenses, including aggravated robbery and attempted aggravated murder. Specifically, Stumpf alleges (1) that his guilty plea was involuntary and unknowing; (2) that his due process rights were violated by the state's use of inconsistent theories to secure convictions against both Stumpf and his accomplice, Clyde Wesley; (3) that he was deprived of effective assistance of counsel at sentencing; and (4) that the Ohio death penalty statute is unconstitutional on its face and as applied to him.

Prior to entering a guilty plea, Stumpf had waived his right to a trial by jury and elected to have his case heard by a three-judge panel. Under Ohio law, when a defendant pleads guilty to aggravated murder, the court must hold an evidentiary hearing to establish a factual basis for the plea. The three-judge panel held such a hearing in this case and found that there was a factual basis for Stumpf's plea, that he was guilty of aggravated murder with the capital specification

and, ultimately, that there was insufficient mitigating evidence to spare Stumpf from imposition of the death penalty.

Under Ohio law at the time of Stumpf's conviction, the aggravated murder statute required that "specific intent" be proved to convict someone of that crime. At the evidentiary hearing to establish a factual basis for Stumpf's plea, Stumpf and his attorneys argued that he did not shoot the victim and, indeed, that he was not present when the victim was shot. The state argued in response that Stumpf was the shooter, and the three-judge panel that heard the case adopted the state's theory, finding that Stumpf was the actual shooter. At a later trial of Stumpf's accomplice Wesley, however, the state presented the testimony of a jailhouse informant to establish that Wesley was the shooter. When Stumpf sought to withdraw his guilty plea on the basis of Wesley's conviction, the state opposed his motion, arguing that the informant's testimony was unreliable.

We conclude that the district court should have granted relief to Stumpf on either or both of two alternative grounds: first, that his guilty plea was unknowing and involuntary because he was manifestly not aware that specific intent was an element of the crime to which he pleaded guilty and, second, that Stumpf's due process rights were violated by the state's deliberate action in securing convictions of both Stumpf and Wesley for the same crime, using inconsistent theories. Because we are granting relief on these two grounds, we do not reach Stumpf's challenge to the effectiveness of counsel's representation at sentencing or to the constitutionality of the Ohio death penalty statute.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. The District Court's Factual Findings

Most of the underlying facts are undisputed in this case and do not affect the legal determinations necessary to the resolution of the appeal. For that reason, and because we review the district court's determination of the facts only for clear error, we adopt the district court's characterization of the facts, as determined by the state courts, as follows:

> On May 14, 1984, Stumpf, Clyde Daniel Wesley, and Norman Leroy Edmonds, after visiting a bar in Washington, Pennsylvania, got on Interstate 70 and headed west toward Ohio. By sundown, they had reached Guernsey County. They stopped their car along I-70 and, leaving Edmonds in the car, Stumpf and Wesley walked to a nearby house under the pretense of needing to make a phone call. The house they chose was owned and occupied by Norman and Mary Jane Stout. Stout admitted Stumpf and Wesley into his home and allowed them to use the phone. When they had completed the call, both Stumpf and Wesley produced pistols and announced a robbery. n1 Stumpf held the Stouts at gunpoint in a back bedroom while Wesley searched the house for items to steal.
>
> At some point, Stout moved toward Stumpf, and Stumpf shot him between the eyes with his pistol. The shot was not fatal, and Stout subsequently pushed Stumpf into the next room. During this altercation, Stout was struck on the head with a pistol and shot in the head a second time. These actions were enough to render him semi-conscious but not to kill him. While lying on the floor in the

> other room, Stout heard four gunshots. There is no dispute that Mary Jane Stout was shot and killed during the course of this robbery, although there is a dispute as to whether Stumpf or Wesley fired the fatal shots. After Mrs. Stout was killed, Stumpf and Wesley stole the Stout's car and fled. Stumpf was arrested several days later, and after initially denying any knowledge about these crimes and then being told that Stout had survived, he confessed to being involved.
>
> At the time the trial court proceedings occurred, Wesley had not yet been extradited from Texas. However, subsequent to Stumpf's having pleaded guilty and having been sentenced to death, Wesley was convicted of aggravated murder by a jury and received a sentence of life imprisonment without the possibility of parole for 20 years. The State introduced evidence at Wesley's trial that Wesley and not Stumpf fired the shots that killed Mrs. Stout. Edmonds was not charged in the Stout murder and robbery, but was charged for other offenses committed during this crime spree, and he agreed to and did testify against both Stumpf and Wesley concerning the murder of Mary Jane Stout.

Stumpf v. Anderson, No. C-1-96-668 (S.D. Ohio Nov. 9, 1999).

> n1 Wesley and Stumpf had carried Edmonds's chrome Raven and Wesley's black .25 caliber pistol with them into the house.

B. Additional Facts Regarding Ballistics Evidence

Of the two bullets that struck Stout, only pieces of each were recovered. Part of the bullet that struck him between the eyes was recovered during surgery, while a second fragment

was found in the second bedroom. A portion of the bullet that struck Stout in the top of the head was recovered during surgery, but part of it had to be left in place. Another bullet was recovered from the mattress of the second bedroom.

Stout's wife was shot four times in the first bedroom. She died from three gunshots to the left side of her head. The fourth bullet went through her left wrist and struck her chest without penetrating the skin of her chest. A fifth bullet was recovered from the wall of that bedroom, above the headboard of the bed.

The chrome Raven was never recovered by the police, and Stumpf admitted that he had thrown it out of the car window after he and Wesley had left the Stout residence. The black .25 caliber pistol was recovered by the police after the men sold it, along with one of Stout's guns, to an individual in Washington, Pennsylvania. Ronald Dye, a ballistics expert from the Ohio Bureau of Criminal Identification and Investigation, a division of the Ohio Attorney General's office, testified at Stumpf's factual basis hearing as to the forensic findings regarding bullets and cartridge cases recovered from the murder scene. Dye testified that there were eight spent cartridges found at the scene, that seven of them had been fired by one gun, and one was fired by a different gun. Dye also said that the black pistol, which had been recovered by the police, fired one bullet, while the other seven bullets were all fired by the same gun. That gun could have been the chrome Raven, or one of several other types of guns.

At Stumpf's plea proceeding, the prosecutor argued that the ballistics evidence supported the conclusion that Stumpf had shot Mrs. Stout, since she was apparently shot with the same weapon used against her husband, saying, "There's ample evidence to conclude that this defendant fired all shots that hit anybody, because the same gun fired all of those

shots." However, during Wesley's trial, the same prosecutor put Eastman, Wesley's cellmate, on the witness stand, to repeat Wesley's confession to him. According to Eastman, Wesley told him that after Stumpf had shot Stout in the face, he dropped the chrome Raven and ran, at which point Wesley picked up the pistol and shot Mrs. Stout. This version of the crime was also supported by the ballistics evidence that the black pistol had a tendency to jam after firing just one round, which may have led Wesley to discard it after shooting it only once.

C. The Guilty Plea

Stumpf and Wesley could not be tried together because Wesley contested his extradition from Texas, where he had been apprehended. As a result, while Wesley was still detained in Texas, Stumpf pleaded guilty to the aggravated murder of Mary Jane Stout, in violation of Ohio Rev. Code § 2903.01(B), and to the capital specification under Ohio Rev. Code § 2929.04(A)(3) that the murder was committed for the purpose of escaping detection, apprehension, trial or punishment for the offenses of the aggravated robbery of the Stouts. He also pleaded guilty to the attempted aggravated murder of Norman Stout and to a firearms specification for each count. Subsequent to the entry of his plea, the prosecutor notified the trial judge that a plea agreement had been reached. Stumpf was questioned about the agreement at some length, as detailed below.

D. The Evidentiary Hearing

Under Ohio law, the trial court must conduct an evidentiary hearing in all aggravated murder cases involving guilty pleas, to determine whether there is a factual basis for

the plea. Following Stumpf's entry of a waiver to have a jury hear the evidence, the hearing commenced before a three-judge panel.

During the factual basis hearing, the prosecution argued that Stumpf had shot Mrs. Stout, while the defense argued that Mrs. Stout was shot by Wesley, not by Stumpf. The three-judge panel found Stumpf "guilty beyond a reasonable doubt" of count one of the indictment (aggravated murder of Mary Jane Stout), along with specification one (that she was killed to escape detection for the crimes of aggravated robbery and attempted aggravated murder) and specification four (firearm), and guilty of count two of the indictment (attempted aggravated murder of Norman Stout), with its firearm specification.

E. The Mitigation Hearing

The mitigation hearing was held one day after the conclusion of the evidentiary hearing, lasted less than two days, and consisted of the presentation of 15 witnesses for the defense—primarily some of Stumpf's friends and family members and a few former employers and teachers—and of an unsworn statement by Stumpf himself. Defense counsel presented no expert witnesses, beyond a parole officer and a court clerk who testified as to Stumpf's lack of a significant criminal history. The general defense strategy was to show that Stumpf had a generally good nature, lacked a violent temper, had a fairly steady work history but a limited education, had a difficult home environment, and was respectful towards women. Stumpf's unsworn statement recounted his version of the crime and emphasized that Wesley, and not Stumpf, had shot Mary Jane Stout.

Following the hearing, the three-judge panel sentenced Stumpf to death, finding that he had established only two

mitigating factors: his age (23) and his lack of a significant criminal background.

F. Appellate Procedural History

After Stumpf's conviction, and while his direct appeal was pending, Clyde Wesley was also convicted, by a jury, of Mary Jane Stout's murder. As a result, Stumpf filed a motion for leave to withdraw his guilty plea or, in the alternative, to have the trial court set aside his death sentence and grant him a new sentencing hearing. The motion was summarily denied by two of the three judges who had heard his case at the trial level (the third judge had died in the interim), and the Ohio Supreme Court affirmed the order at the same time it affirmed Stumpf's conviction on direct appeal.

Stumpf then filed a petition for post-conviction relief in state court, raising challenges to the validity of his jury trial waiver and the effectiveness of trial counsel's representation, particularly with regard to counsel's advice to Stumpf that he would not receive the death penalty if he pleaded guilty. In the petition, Stumpf requested an evidentiary hearing and submitted multiple affidavits in support of his claims. The trial court dismissed the petition without an evidentiary hearing, and this decision was affirmed by the Ohio Court of Appeals. The Ohio Supreme Court dismissed the appeal, see *State v. Stumpf*, 56 Ohio St. 3d 712, 565 N.E.2d 835 (Table)(Ohio 1990), and the United States Supreme Court subsequently denied certiorari. See *Stumpf v. Ohio*, 502 U.S. 956, 116 L. Ed. 2d 435, 112 S. Ct. 415 (1991).

Stumpf next filed a petition for a writ of habeas corpus in federal court, alleging as grounds for relief that the Ohio Death Penalty statute is unconstitutional, both as written and as applied to Stumpf; that his guilty plea was not knowing and intelligent; that his waiver of the right to a jury trial was invalid; that he received ineffective assistance of counsel at

the penalty phase; that he was not permitted to be present at his motion for a new trial; that the trial court improperly considered non-statutory aggravating circumstances and ignored substantial mitigating evidence when deciding his sentence; that the trial court erred in denying his motion to vacate his sentence or withdraw his guilty plea based on newly discovered evidence; that consideration of post-sentence proceedings by less than the entire three-judge panel violated his due process rights; and that the trial court erred by failing to follow an Ohio statutory requirement that the court produce a meaningful written analysis of the mitigation evidence as a basis for imposing a death sentence.

The district court issued two opinion and orders. The first found that several of petitioner's claims had been procedurally defaulted, see *Stumpf v. Anderson*, No. C-1-96-668 (S.D. Ohio Nov. 9, 1999); the second denied relief on the remaining claims, see *Stumpf v. Anderson*, No. C-1-96-668 (S.D. Ohio Feb. 7, 2001). However, the district court did grant a certificate of appealability on the following five issues: (1) whether the statutory provisions governing Ohio's capital punishment scheme violate the *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendments to the United States Constitution*, either on their face or as applied to Stumpf; (2) whether Stumpf's guilty plea was knowing, intelligent and voluntary; (3) whether Stumpf received the ineffective assistance of counsel at the penalty phase of his trial; (4) whether Stumpf's due process rights were violated when the trial court failed to vacate his sentence or allow him to withdraw his plea based on newly discovered evidence; and (5) whether Stumpf received the ineffective assistance of appellate counsel. Before us, Stumpf has pressed the first four claims but has abandoned the claim that appellate counsel was ineffective.

II. STANDARD OF REVIEW

Because Stumpf's federal habeas petition was filed in November 1995, the amendments to 28 U.S.C. § 2254 contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) do not apply to this case. See *Lindh v. Murphy*, 521 U.S. 320, 336, 138 L. Ed. 2d 481, 117 S. Ct. 2059)(1997) (finding that AEDPA changes do not apply to cases pending at the time of AEDPA's enactment on April 24, 1996). Stumpf's claims, therefore, must be evaluated under § 2254(d) as it existed prior to the enactment of AEDPA.

Accordingly, we review the district court's disposition of a petition for writ of habeas corpus *de novo*, although the district court's factual findings are reviewed only for clear error. *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996). We also defer to the state court's factual findings, which may be rebutted only by "clear and convincing evidence." *Id.* However, this deference only applies to "basic, primary facts" and not to mixed question of law and fact, which are subject to *de novo* review. *Id.*

III. ANALYSIS

A. The Validity of the Petitioner's Guilty Plea

The Supreme Court has held, in *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969), that when a defendant enters a guilty plea, the state bears the burden of showing that the plea was voluntary, intelligent and knowing. Determining whether a plea is voluntary, intelligent and knowing requires an analysis of the totality of the circumstances. *Garcia v. Johnson*, 991 F.2d 324, 326 (6th Cir. 1993). When a defendant brings a federal habeas petition challenging his plea, the state generally satisfies this burden by producing a transcript of the plea proceeding. *Garcia*, 991 F.2d 324, 326. A state court finding that the plea was proper

is accorded a presumption of correctness, unless the transcript of the plea proceeding is inadequate to demonstrate that the plea was voluntary, intelligent and knowing. *Garcia* at 326-27; *Dunn v. Simmons*, 877 F.2d 1275, 1277 (6th Cir. 1989), *overruled on other grounds by Parke v. Raley*, 506 U.S. 20, 121 L. Ed. 2d 391, 113 S. Ct. 517 (1992).

The proper standard of review in this case, then, turns on whether the record of state court proceedings surrounding Stumpf's guilty plea "leaves doubt as to whether the plea was in fact intelligent and voluntary." *Dunn*, 877 F.2d at 1277 (citing *Roddy v. Black*, 516 F.2d 1380, 1384 (6th Cir. 1975)). If the record does leave doubt as to whether the plea was voluntary, intelligent and knowing, and the defendant argues that it was not, the State bears the burden of proving the contrary. *Id.* (citing *Boykin*, 395 U.S. at 243).

Although Stumpf does not contend explicitly that his guilty plea was invalid because he was not aware that specific intent was an element of the crime to which he pleaded guilty, this argument is inherent in the fact that he continually professed his innocence of committing the actual shooting both during and after the guilty plea. The record reflects, for example, his expectation that he would be given an opportunity to present evidence to the three-judge panel relevant to his conduct. Moreover, the record indicates that the explicit statutory requirement of intent was never explained to Stumpf during the plea colloquy. Furthermore, although his attorneys represented to the court that they had explained to Stumpf the elements of the crime, their own arguments to the court during the plea colloquy and the evidentiary hearing to establish a factual basis for the plea refute the typical presumption that defense counsel have fully and adequately explained all elements of a crime to a client before he pleads guilty. Indeed, defense counsel's representations to the court either betray their own ignorance of the intent element of aggravated murder, or represent a

woefully inadequate understanding of the meaning of a guilty plea. Finally, the plea colloquy itself, along with Stumpf's statements to the court through all stages of the proceedings, demonstrates Stumpf's unwillingness to admit to intent.

At the time of Stumpf's crime and subsequent conviction, Ohio's aggravated murder statute specified that specific intent was a necessary element of aggravated murder. The statute read as follows:

> § 2903.01 Aggravated murder.
>
> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while fleeing immediately after committing or attempting to commit kidnapping [sic], rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.
>
> Ohio Rev. Code § 2903.01 (1984) (amended 1996). n2
>
> n2 Ohio Rev. Code § 2903.01 was amended on July 1, 1996. Section (D) was removed and replaced with additional descriptions of aggravated murder. See Ohio Rev. Code § 2903.01 (2002).

Stumpf was convicted under § 2903.01(B), which, although it specifies that the murder must be caused "purposely," does not specifically require intent. However,

subsection (D) of the same statute clarifies that intent is indeed a necessary element of aggravated murder:

> (D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another . . . .

Ohio Rev. Code § 2903.01 (1984) (amended 1996). Furthermore, the statute limits fact-finders from inferring specific intent solely from an accused's participation in a felony murder:

> In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of or attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive,

> that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed . . . .

Ohio Rev. Code § 2903.01(D) (1984) (amended 1996). Finally, the fact-finder must also be instructed that "the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt." Ohio Rev. Code § 2903.01(D) (1984) (amended 1996). Read together, these provisions indicate that specific intent may not be inferred solely from the fact of participation in a felony murder but must be established explicitly by the prosecution.

Ohio courts have confirmed this interpretation of the statute. In *In re Washington*, 81 Ohio St. 3d 337, 1998 Ohio 627, 691 N.E.2d 285, 287 (Ohio 1998), the Supreme Court of Ohio considered an appeal regarding whether there was sufficient evidence to support the specific intent requisite for an aggravated murder conviction, in a case in which the murder was committed in the course of a robbery. As the court explained: "Washington cannot [be found guilty of] aggravated murder based solely on his complicitous actions. It is also necessary for the state to establish that Washington acted with the kind of culpability required of the commission of aggravated murder." *Id.* In this particular case, the court found that there was sufficient evidence for the trial court to conclude that Washington had acted with the requisite intent, because the trial court inferred intent only after "hearing and considering all the evidence" instead of presuming intent based on Washington's participation in the robbery. *Id.*

Here, the record of the plea proceeding clearly demonstrates that the defendant did not possess an

understanding of the aggravated murder charge to which he pleaded guilty. Although the district court ultimately concluded that the state court record was suggestive of a knowing and voluntary plea, it did concede that the plea proceeding was "not a picture of clarity." We agree, and we note that this "lack of clarity" first surfaced at the moment the prosecutor informed the court that a plea agreement had been reached. He gave the following account of the agreement:

> SCOTT: Your Honor, the first matter that would be dealt with or the State would ask leave of Court pursuant to Criminal Rule 7 (D) and Ohio Revised Code Section 2941.30 to amend by interlineation specification one to the first count of the Indictment in order that it may read as follows: The Grand Jurors further find and specify under Ohio Revised Code Section 2929.04(A)(3) in compliance with Ohio Revised Code Section 2941.14 that the aforesaid offense being the offense charged in the first court, the Aggravated Murder, was [committed] for the purpose of escaping detection, apprehension, trial or punishment for other offenses—the words, "other offenses" are the first change, committed by the above named John David Stumpf, to wit: Aggravated Robbery and then we're adding the language "and Attempted Aggravated Murder." If that amendment is granted, the defendant then would enter a plea of guilty to the first count contained in the Indictment, being the Aggravated Murder count and a plea of guilty to specification one to the first count as amended; would also enter a plea of guilty to the second count in the Indictment, being the offense of—excuse me, back up. As to the first count he would also enter a plea of guilty to specification four to the first count. So, he will be pleading to

> the first count, the amended specification one to the first count and specification four to the first count. With regard to the second count, being the Attempted Aggravated Murder, he would enter a plea of guilty to the Attempted Aggravated Murder and a plea of guilty to the specification to the second count. If the pleas of guilty to the two counts and the specifications I've mentioned are accepted by the Court, the Court would then proceed under Criminal Rule 11(C)(3) to determine if there is a factual basis for the plea of guilty to the Aggravated Murder charge and the existence of the aggravating circumstances and if the pleas are accepted the State would then ask leave to enter a nolle pros as to specifications two and three to the first count and also a nolle pros as to the third, fourth and fifth counts in the Indictment and including the specification to the third count.
>
> That is my understanding of the arrangement that we are proposing to the Court at the present time. n3
>
> n3 The plea agreement also merged specification four of count one, and specification one of count two. That is, both gun specifications were to be treated as part of the same offense for sentencing purposes.

Reviewing this portion of the trial court record, the district court commented that "the prosecuting attorney's explanation of the plea agreement was somewhat difficult to follow, and that criminal defendants in such situations will often answer questions posed by the trial court without a clear understanding of each and every term uttered—especially if advised by counsel to do just that." But the trial court in this case, rather than attempting to elucidate the prosecutor's

explanation for the defendant, immediately turned to the defendant for verification of the prosecutor's account of the plea agreement. As the record reveals, even at this stage in the plea agreement, the defendant appeared to be unable to follow the proceedings:

> JUDGE HENDERSON: Thank you, Scott. Before ruling on the motion or amendment of the Indictment, I would ask Counsel for the defense if they wish to comment upon the statement of the Prosecutor. Tingle?
>
> TINGLE: If the Court please, the statement made by the Prosecuting Attorney is an accurate statement based upon our discussions with him earlier today and one upon which we are ready to proceed at this time.
>
> JUDGE HENDERSON: I'm going to ask the Counsel for the defendant to inform the defendant that I am going to ask one question of the defendant very shortly and that question is this: Do you, John David Stumpf, affirmatively acknowledge the agreement that has been stated by the Prosecutor and concurred in by the defendant's counsel? Having forewarned the defendant of the question that is to be asked, I'm going to ask that question now. Stumpf, do you affirmatively acknowledge this agreement?
>
> STEPHENS: Would you repeat the question for him Your Honor?
>
> JUDGE HENDERSON: Stumpf, do you affirmatively acknowledge the agreement that has been stated by the Prosecutor and concurred in by your attorneys?

> THE DEFENDANT: Yes, sir.

Obviously, not every ambiguity in a plea proceeding, without more, will demonstrate that a plea is not "knowing and intelligent." However, the exchange set out above turned out to be merely the beginning of much confusion that was to follow. After allowing amendment of the indictment, the court conducted a plea colloquy, examining first the defense attorneys, and then the defendant:

> JUDGE HENDERSON: The Indictment seems to be in order and the Court is going to make certain inquiries of the counsel for the defendant and the defendant as to the proposed entry of the guilty plea. It is necessary that question be asked and answers thoughtfully given in a case of this sort. I'm going to inquire of the attorneys for the defendant, have you fully investigated the facts and the law of this case and determined whether there exists any question of the admissibility of any claimed admissions, confessions or other evidence under Federal and State law and advised your client concerning the same?
>
> TINGLE: We have, Your Honor.
>
> JUDGE HENDERSON: Have you informed your client of the elements of the offenses with which he is charged, of all defenses which may be available to him and of all of his Constitutional rights, both State and Federal?
>
> TINGLE: Yes, we have.

After his attorneys indicated that they had explained the elements of the crime to their client, Stumpf was sworn in for

the limited purpose of answering questions concerning his guilty plea, and affirmed his attorney's statements, as follows:

> JUDGE HENDERSON: Stumpf, I'm going to ask you a number of questions and if you do not understand those questions you may inquire of your attorneys to better able you to understand everything that is being asked you. These have to do with the rights that you have as a person who has been accused of a crime. Do you understand that you have a constitutional privilege against self-incrimination?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: With a full understanding that anything that you say may be used against you, are you willing then to answer questions with regard to your understanding of your rights?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: Now, you heard the questions that I put to your attorneys, I believe, relative to their advice to you and their counseling of you, did you not?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: Do you personally acknowledge that your attorneys have informed and advised you as they say they have?
>
> THE DEFENDANT: Yes, sir.

> JUDGE HENDERSON: Are you satisfied with the services which they have performed for you?
>
> THE DEFENDANT: Yes, sir.

Judge Henderson next questioned Stumpf as to his physical and mental health, and whether he was presently under the influence of drugs or alcohol. He then went over the crimes to which Stumpf was pleading guilty. The following is a complete account of his explanation to the defendant:

> JUDGE HENDERSON: Do you understand that you are charged with several offenses? The first offense being that of Aggravated Murder, that there have been two specifications being presented at this time in this particular proceedings, to wit: Aggravated Robbery and Attempted Murder and possession of a firearm while committing those offenses. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: Do you understand also that you have been charged with the offense of Attempted Aggravated Murder, which is a felony in the first degree?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: For the first count, which is that of Aggravated Murder, you are subject to the following penalties: you are subject to being—to a sentence of twenty years without probation, that is, a sentence of life without probation for twenty years; a sentence of life without probation for a period of thirty years and

the death penalty by electrocution could be imposed against you. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that you would be subject under the—under specification four to the first count to three years incarceration before you begin to serve any other sentence?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that the Attempted Aggravated Murder, which is set forth in count two, is a felony in the first degree and that you could be sentenced to be incarcerated for a period of four, five, six or seven but not more than twenty-five years? Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that for a felony of the first degree that you could be fined not more than $10,000.00?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: And that you could receive both the fine and the incarceration, which I have mentioned?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Are you presently on probation or parole, sir?

THE DEFENDANT: No, sir.

As indicated below, Stumpf has a low IQ and has been found to be mentally and emotionally immature. Nevertheless, the trial court never inquired into Stumpf's ability to understand the guilty plea proceedings or the nature of the charges against him. The explanation set out above is the only account of the crimes provided to Stumpf by the court. Nowhere does the court explain the elements, or even read the charges as listed in the indictment. n4

n4 Stumpf did initial the interlineation amendment to the indictment during the plea hearing, but there is no indication in the record that he had actually read the indictment at any point or that it had been read to him. Moreover, we conclude that use of the term "purposely" is not sufficient to put the defendant on notice that specific intent, which is expressly more than intent implied from participation in a felony, is a required element of aggravated murder.

Judge Henderson then proceeded to question Stumpf about the rights he was surrendering by pleading guilty. The exchange went as follows:

JUDGE HENDERSON: Do you understand that if you plead guilty you will waive, that is, you will give up the right to a jury trial or trial by the Court; the right to be presumed innocent and until proved guilty beyond a reasonable doubt; the right to confront and to question the witnesses against you and to have compulsory process for obtaining witnesses in your favor; the right to remain silent or to testify at your trial as you may choose and that no inferences may be drawn if you choose not to testify at your trial. Do you

understand that you may be giving up those rights?

STEPHENS: Your Honor, with reference to that, we have explained that to the defendant. *He was going to respond but we have informed him that there is, after the plea, a hearing or trial relative to the underlying facts so that he is of the belief that there will be presentation of evidence* and I wanted to make that clear to the Court with reference to his right of waiver of trial to Court.

JUDGE HENDERSON: I understand that and I appreciate your bringing that to my attention, Stephens. Of course *in the sentencing portion of this trial you do have those rights to speak in your own behalf to present evidence and testimony on your own behalf.* My statement to you and my question to you was intended to except those rights that you do have. Counsel, is that satisfactory?

STEPHENS: Yes, sir.

We read this exchange to reflect a misunderstanding between attorney Stephens and Judge Henderson. Stephens, answering for Stumpf, asserted the defendant's right to present evidence during "a hearing or trial relative to the underlying facts" of the case. He was plainly referring to the factual basis hearing and asserting the defendant's wish to challenge the state's version of the facts. Judge Henderson indicated in response that the defendant could present evidence during "the sentencing portion of this trial," apparently referring to the mitigation phase. In any case, this was the first indication that the defendant did not wish to concede the state's version of the facts. The parties next

discussed a prior suppression hearing, and then the court resumed questioning Stumpf:

JUDGE HENDERSON: Do you understand, Stumpf, that if any promises or inducements have been made to you by any person to cause you to plead guilty that they are not binding upon the Court, that if you plead guilty that Court, this panel of Judges, will decide your sentence after considering all of the evidence that is to be presented and evidence in mitigation of punishment and after considering a presentence investigation, report and recommendation approved and prepared by the probation department and that you may receive the maximum sentence prescribed by law. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Have any promises or inducements been made to you, sir, other than the agreement which you have affirmatively acknowledged on the record?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you in fact guilty of count one with specification one and specification four?

STEPHENS: One moment, Your Honor. *Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of his right to present evidence at a later time relative to his conduct, but he'll respond to that.*

JUDGE HENDERSON: At no time am I implying that the defendant will not have *the right to present evidence in mitigation hearing* and I do appreciate it, Stephens, that you bring this to the attention of the Court. And I'm going to ask that the defendant, himself, respond to the question that I asked with that understanding that he has the right to present evidence in mitigation. I'm going to ask the defendant if he is in fact guilty of the charge set forth in Count one, including specification one and specification four?

The Defendant: Yes, sir.

Again, the exchange between Stephens and Judge Henderson has all the hallmarks of a serious misunderstanding. Stumpf was unwilling to plead "guilty" without expressly reserving his right to present evidence "relevant to his conduct." Read with the preceding reference to presenting evidence, this could only refer to the subsequent evidentiary hearing to establish a factual basis for the plea. Stumpf, obviously, was reiterating his desire to challenge the state's account of his actions, and had the procedure called for an immediate determination of the evidence relied upon by the state to support the defendant's imminent conviction, the misunderstanding would undoubtedly have come to light before the plea was finalized and Stumpf's fate was sealed. Once again, however, Judge Henderson referred to the defendant's "right to present evidence in mitigation hearing," completely missing the clear implication that despite his admission of guilt, Stumpf was concerned about preserving his ability to contest the state's account of his actions.

Moreover, defense counsel's arguments during the subsequent evidentiary hearing confirm the defendant's desire

to contest the state's version of the crime. From the opening statement at that hearing, counsel argued that Wesley, not Stumpf, was the one who shot Mary Jane Stout. For example, defense counsel's opening statement included the following:

> The scenario as outlined by Scott [the prosecutor] does follow the sequence of events as they did occur, except for the statements as to the actual shooting of Mary Jane Stout, which the defendant believes the evidence will show occurred at the hands of Daniel Wesley.

The district court rejected Stumpf's argument that his position that he was not the shooter rendered his guilty plea involuntary, relying on *Garcia*, 991 F.2d at 327, as authority for the proposition that a "temporary qualification of position by the defendant is not sufficient to rebut the presumption of correctness of state court proceedings, and to support a finding that [the defendant] did not understand the nature of his plea." *Stumpf v. Anderson*, 2001 WL 242585 (S.D. Ohio 2001) (quoting *Garcia*, 991 F.2d at 327). We conclude that the district court's reliance was misplaced, however, because Stumpf's qualification was more than temporary, and it was never addressed by the trial court.

By contrast, in *Garcia*, the defendant first claimed that he had not intended to kill his victim. *Garcia*, 991 F.2d at 327. After this statement, the judge conducted "a substantial discussion" with the defendant regarding the facts of the case, and Garcia then admitted that he had intended to kill his victim. *Id.* Here, the trial judge, before accepting Stumpf's plea, had not informed the defendant that specific intent was an element of the crime to which he was pleading, nor had he inquired whether Stumpf had actually shot the victim or, if not, had specifically intended that she be killed. In the absence of some inquiry, Stumpf's express reservations of his ability to put on evidence of his version of the crime, along

with his attorneys' arguments that he did not intend, and was not even present for, the killing of Mrs. Stout, should have put the trial court on notice that Stumpf was not aware of the true import of his plea.

The district court did not focus on the question of intent. Rather, it found that Stumpf's position that he was not the shooter was consistent with the *specification* to which he pleaded guilty. However, in making this finding, the district court failed to recognize that Stumpf's position is inconsistent with the *charge* to which he also pleaded guilty. It is this inconsistency that gives rise to his claim that his plea was not validly entered.

Generally, a reviewing court presumes that defense counsel has explained the elements of the crime to a defendant pleading guilty, even where the record does not reflect any statement by counsel to that effect. *Berry v. Mintzes*, 726 F.2d 1142, 1147 (6th Cir. 1984) ("it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice"); but cf. *Henderson v. Morgan*, 426 U.S. 637, 642-48, 49 L. Ed. 2d 108, 96 S. Ct. 2253 (1976) (finding that, where the defendant's attorneys had argued to the court that their client had not intended to harm the victim, there could be no presumption that counsel had explained to their client that intent was an element of the crime). In this case, defense counsel did state to the court that they had informed Stumpf of the elements of the crime. In a typical case, such an assurance would prevent a reviewing court from finding that a plea was involuntary. In this case, however, the record clearly establishes that Stumpf sought to preserve his right to argue that he was not the shooter and thus counterbalances the assurances given by defense counsel that they had explained the elements to Stumpf.

We recognize, of course, that Stumpf need not have been the "principal offender"—the actual shooter—in order to have specifically intended the death of Mary Jane Stout. Nevertheless, it is clear from the record of the factual basis hearing that the state's theory of guilt relied completely on Stumpf being the principal offender. The prosecution presented no evidence that Stumpf intended Mrs. Stout's death, other than arguing that he was the actual shooter. In the closing arguments at the evidentiary hearing, defense counsel, contending that the prosecution had not met its burden with regard to the basis for seeking the death penalty, effectively challenged the prosecution's proof as to specific intent to kill. The prosecutor responded that "as to a purpose to kill, whoever shot Mrs. Stout didn't intend to do her any favors when he shot her four times. It seems to me that shooting a person four times shows what your intent was."

Indeed, the three-judge panel, which presumably knew of the intent element, found, beyond a reasonable doubt, that Stumpf was "the principal offender" in the aggravated murder and made no other finding as to specific intent. Its conclusion in this regard indicates that the panel found that Stumpf's shooting of Mrs. Stout provided the requisite specific intent, as there was no other evidence in the record to satisfy this element. Given this finding, it is unlikely that Stumpf can be said to have knowingly conceded specific intent to kill by pleading guilty, when he continued to maintain throughout the proceedings that he had not been the one who actually shot the victim.

We conclude that the record of Stumpf's plea hearing and the subsequent evidentiary hearing, taken together, demonstrate that the plea he entered was constitutionally invalid. *Boykin* holds that, "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Boykin*, 395

U.S. at 243 n.5. This understanding must include "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Henderson v. Morgan*, 426 U.S. at 644 (quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 85 L. Ed. 859, 61 S. Ct. 572 (1941) (finding that, because the defendant did not know intent was an element of the crime to which he pleaded guilty, his plea could not be voluntary). n5 We have held that "a guilty plea is not deemed voluntary where the person entering it does so without understanding of the consequences of his plea." *United States v. Stubbs*, 279 F.3d 402, 411, 412 (6th Cir. 2002) (quotation omitted) (finding, in a split decision in a case involving a mandatory minimum sentence, that if the "essential elements of the crime with which the defendant was charged were not understood by the defendant, his counsel, or the district court, then the defendant's guilty plea would be constitutionally invalid").

n5 Indeed, in *Henderson*, the defendant had heard the indictment, which charged that he had "willfully" stabbed the victim, read in open court. *Henderson*, 426 U.S. 637, 642, 49 L. Ed. 2d 108, 96 S. Ct. 2253. The Supreme Court found that this was not sufficient to put him on notice that intent was a required element of the crime to which he was pleading guilty. *Id.* at 645-46.

As discussed above, when the state court record of a defendant's plea does not demonstrate that the plea is constitutionally adequate, the state bears the burden of showing the plea was voluntary, knowing and intelligent. Here, the state has presented no extrinsic evidence to counter the record of the proceedings discussed above. Instead, the respondent has explicitly relied on that record alone to argue that the plea was voluntary, knowing, and intelligent. Given the paucity—indeed, the lack—of the evidence to refute what is clear on the record, we must conclude that the state has

therefore not met its burden of showing that the plea may stand.

Furthermore, the totality of the circumstances surrounding the plea provide additional evidence that the plea was not voluntary, knowing, and intelligent. For example, Stumpf argues that the fact that he remained eligible for the death penalty and, therefore, pleaded guilty under an agreement that provided absolutely no benefit in the form of a reduction in possible sentence, is an additional indication that his plea was not knowing and intelligent. n6 This argument standing alone would not carry much weight, given the well-recognized principle that a guilty plea cannot be rendered involuntary merely because, in hindsight, it turned out not to be the best decision. See *McMann v. Richardson*, 397 U.S. 759, 769-71, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970). However, Stumpf's decision to plead guilty—by agreement—to a crime with a capital specification, especially in the absence of any identifiable reason to take such a course of action, creates an additional inference that his plea was invalid. In combination with his position that he was not the shooter, which reveals his ignorance of specific intent as an element of the crime, the record indicates that Stumpf's plea was involuntary "because he had such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Ivy v. Caspari*, 173 F.3d 1136, 1141-42 (8th Cir. 1999) (guilty plea involuntary where defendant was not informed that intent was a necessary element of the underlying felony).

N6 Stumpf also claims that his plea was invalid because he was not aware that he remained eligible for the death penalty. We discount this as a possible basis for relief, however, because the record of the plea hearing indicates that the judge, while listing the possible sentences Stumpf could receive for aggravated murder, did inform Stumpf at the time of his plea that "the death

penalty by electrocution could be imposed against you." The judge then asked whether Stumpf understood, and Stumpf answered, "Yes, sir."

The question of counsel's effectiveness in representing Stumpf is not before us as an independent ground for relief. It is, however, raised in the context of challenge to the validity of his guilty plea. The record shows clearly that Stumpf has always denied being the shooter. It is also clear that defense counsel's strategy, throughout both the evidentiary hearing and the mitigation hearing, was to argue that after Stumpf shot Norman Stout he panicked and fled, that Stumpf was not even present in the home when Mary Jane Stout was shot, and that Wesley was, in fact, the one who shot Mrs. Stout. One possible, if unlikely, explanation for counsel's strategy is that they themselves were unaware that specific intent was an element of the crime. But, failure to research the most basic details of the statute under which their client was charged would be outside the "range of competence" to which the defendant is entitled. See *Henderson*, 426 U.S. at 647. Perhaps more disturbing is the possibility that counsel, realizing that intent was an element of the offense, nonetheless chose to allow their client to plead guilty and then—and only then—to contest the existence of that element. But this, too, would manifestly constitute ineffective assistance, since a plea is not merely a confession but serves as a conviction, with only the resulting sentence left to be decided. See *Boykin*, 395 U.S. at 242. It is true that Ohio requires a factual basis hearing in cases of aggravated murder, but it would nonetheless be reckless and plainly incompetent for an attorney to rely on a factual basis hearing to refute an element of a crime to which his client has already pleaded guilty. Finally, whether Stumpf's lawyers were aware of the intent element or not, their behavior compels the conclusion that Stumpf himself was not aware of the intent element. Stumpf's observation of his attorneys' attempt to contest the state's version of events, and his own position throughout the

plea colloquy that he intended to challenge the state's facts, a position evidently sanctioned by his attorneys, reaffirms the conclusion that Stumpf was not aware that by pleading guilty to aggravated murder he was admitting to specific intent to kill Mary Jane Stout.

There are other indications in the record, as well, pointing to the existence of at least a reasonable probability that Stumpf would not have pleaded guilty had he known that such a plea would have amounted to admitting that he specifically intended the death of Mary Jane Stout. A mitigation investigator later reported, in an affidavit, that "John did not want to plead guilty." Moreover, affidavits from Stumpf's family affirm the impression that his attorneys were less than candid in explaining to them the motive behind the plea. For example, Stumpf's mother and sister said that they were told by Stumpf's attorney that he would not receive the death penalty because of his plea.

We conclude from the record before us, as it relates to the murder of Mary Jane Stout, that there exists a reasonable probability that, had the petitioner been fully informed of the elements of the offense to which he was pleading and consequences of that plea, he would not have pleaded guilty to her aggravated murder.

B. The Due Process Violation

At the time of Stumpf's post-plea evidentiary hearing and his mitigation—or sentencing—hearing, his accomplice, Wesley, was still in Texas, fighting extradition. During both Stumpf's plea hearing, held pursuant to Ohio Rev. Code § 2945.06, and his sentencing hearing, the prosecutor argued, and the three-judge panel ultimately found, that Stumpf was the principal offender, responsible for actually shooting Mary Jane Stout. After Stumpf's sentencing in the fall of 1984, the state tried Clyde Wesley before a jury in the spring of 1985. Wesley was also charged with aggravated murder with capital specifications, and during his trial, the state argued that Wesley, not Stumpf, was the shooter. To support this argument, the state presented testimony from Eastman, Wesley's cellmate, about statements Wesley had made to Eastman concerning details about the murder. Wesley took the stand and denied that he was the shooter, but the jury convicted him of the aggravated murder of Mrs. Stout. At the sentencing phase of Wesley's trial, the same jury then recommended a sentence of 20 years to life, rather than the death penalty.

Stumpf argues that the prosecutor's use of two conflicting theories concerning the identity of the shooter to convict both him and Wesley constitutes a due process violation.

The Constitution's Due Process clause guarantees every defendant the right to a fair trial. See *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 24-5, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981); *Turner v. Louisiana*, 379 U.S. 466, 471-72, 13 L. Ed. 2d 424, 85 S. Ct. 546 (1965). The Supreme Court has also emphasized that "because the prosecutor is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer . . . , it is as much his duty to refrain from improper methods

calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935), *overruled on other grounds*, *Stirone v. United States*, 361 U.S. 212, 4 L. Ed. 2d 252, 80 S. Ct. 270 (1960).

Drawing on the principle that the Constitution's "overriding concern [is] with the justice of the finding of guilt," *United States v. Agurs*, 427 U.S. 97, 112, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976), several of our sister circuits have found, or implied, that the use of inconsistent, irreconcilable theories to secure convictions against more than one defendant in prosecutions for the same crime violates the *due process clause*. See, e.g., *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc), *vacated on other grounds*, 523 U.S. 538, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998); *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (en banc) (Clark, J., specially concurring); cf. *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995) (involving a situation where both defendants had shot at the victim and it was unclear whose bullet had actually hit and killed the victim; the court found that the two theories advanced by the prosecution were not inconsistent because both defendants could have been convicted under the law of parties). On this issue of first impression in this court, we now join our sister circuits in finding that the use of inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation.

In *Smith v. Groose*, the Eighth Circuit considered a case in which a prosecutor had used two different, conflicting statements by a co-defendant at successive trials to convict the petitioner at the first trial and a second individual at a second trial. See *Smith v. Groose*, 205 F.3d at 1049. That case involved a group of four young men who were looking for homes to burglarize one evening. In the course of their search, they saw another group of burglars breaking into a home.

They realized they knew these men and decided to help them break into the house. The residents were murdered in the course of the burglary. The primary issue at trial was whether the murders took place before or after the four young men began participating in the offense. One of the four men first told the police that the other group had committed the murders without the participation of the group of four. Two days later, he told police that he had seen one of the four men from his group stabbing the victims with a pocketknife; he later recanted this story. The prosecutor then used both statements to obtain convictions against men in each of the two groups. See *id.* at 1047-49.

Examining the record before it, the Eighth Circuit held that "the use of inherently factually contradictory theories violates the principles of due process." *Id.* at 1052. The court found that in order to amount to a due process violation, an inconsistency in the prosecutor's theories "must exist at the core of the prosecutor's case against defendants for the same crime." *Id.* This constitutes a due process violation because it renders convictions unreliable, given that "the state's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth." *Id.* at 1051.

In finding a due process violation under these circumstances, the Eighth Circuit in *Smith v. Groose* was careful to distinguish the facts in its case from those in the Fifth Circuit's opinion in *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995), where the court did not reach the due process question in a case in which the prosecutor argued in two separate cases that different defendants had each shot the one bullet that killed the victim. See *id.* at 1268. The distinction in the *Nichols* case was that both perpetrators had fired shots at the victim, and both could have been convicted under a felony murder theory. Therefore, the prosecutor's arguments were not factually inconsistent, because both defendants could have

been convicted even if the prosecutor had used the identical argument in both cases. See *Groose*, 205 F.3d at 1051.

Finally, the Ninth Circuit considered a similar situation in *Thompson*. In that case, the prosecutor argued at one trial that, based on jailhouse informant testimony, one defendant had committed a rape and murder. At a second trial, the prosecutor used different jailhouse informants to argue that the second defendant had the motive and disposition to commit the crimes. A plurality of the en banc Ninth Circuit, n7 specifically excluding situations where new evidence comes to light, found that a prosecutor cannot use inconsistent theories of the same crime in order to secure multiple convictions. See *id.* at 1058. The court echoed Judge Clark's concurrence in an Eleventh Circuit case which, although it granted habeas relief on alternate grounds, also involved inconsistent theories:

> The prosecutor's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice . . . The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for the truth.

Thompson, 120 F.3d at 1059 (quoting *Drake*, 762 F.2d at 1479 (Clark, J., concurring)).

n7 The majority opinion rested on an ineffective assistance of counsel claim. See *Thompson*, 120 F.3d at 1051-56. However, despite the fact that a majority of judges did not join in the portion of the opinion finding a

due process violation, several of the concurring and dissenting judges indicated that they would find a due process violation for the use of wholly inconsistent theories to convict separate defendants. See, e.g., *id.* at 1063-64 (Tashima, J., concurring, joined by Thomas, J.) (agreeing with the premise that "due process is violated when a prosecutor pursues wholly inconsistent theories of a case at separate trials" but arguing that, in order to find prejudice, the court must decide which of the two theories is true) (quotation omitted); *id.* at 1066-73 (Kozinski, J., dissenting, joined by Nelson, J.) ("In the case of mutually inconsistent verdict, which I am not sure is the case here, I believe that the state is required to take the necessary steps to set aside or modify at least one of the verdicts." *Id.* at 1071.)

In this case, the state clearly used inconsistent, irreconcilable theories at Stumpf's hearings and Wesley's trial At each proceeding, the prosecutor argued that the defendant had been the one to pull the trigger, resulting in the fatal shots to Mary Jane Stout. At Wesley's trial, the prosecutor relied on Eastman's testimony and on the gun-switching scenario argued by Stumpf, to secure Wesley's conviction. The prosecutor asserted:

> Believing he had killed Mr. Stout, [Stumpf] pitched the gun aside and left the immediate area back the hallway down the steps to the basement. At that point [Wesley,] whose own gun was jammed, picked that chrome colored Raven up and as Mrs. Stout sat helplessly on her bed, shot her four times in order to leave no witnesses to the crime.

These statements are irreconcilably inconsistent with those made by the very same prosecutor at Stumpf's plea hearing, when he told the trial court:

> Believing that the had killed Mr. Stout, Stumpf [then] turned the same chrome colored Raven automatic pistol upon Mary Jane Stout as she sat on the bed and shot her four times. Three times in the left side of the head and neck and one time in the writs; obviously in order not to leave anyone available to identify him.

The state claims that, because Eastman's testimony was not available at the time of Stumpf's guilty plea, Stumpf is really asserting Wesley's due process claim in the guise of his own. The state also argues that "it was of no import to the charge of capital murder against Stumpf which of the two [defendants] killed the witness [Mrs. Stout]" since the capital specification was that Mrs. Stout was killed because she was a witness to the crime, and not that the defendant had been the shooter. Finally, the state asserts that inconsistent, irreconcilable theories were not used in these two cases, because the prosecution did not rely on Eastman's testimony at Wesley's trial. None of these arguments is persuasive.

First, Stumpf clearly has a due process claim even though Eastman's testimony was not available at the time of his trial. It is true that this is not a case where the prosecutor selectively presented evidence in Stumpf's case to support the theory of the murder he was arguing in that case. However, the due process challenge to the use of inconsistent theories is based on the notion of fundamental fairness. Because inconsistent theories render convictions unreliable, they constitute a violation of the due process rights of any defendant in whose trial they are used. In *Groose*, the petitioner was in fact the defendant at the first trial, and the second, inconsistent theory did not come to light until four years after his conviction, at the second trial. See *Groose*, 205 F.3d at 1048. Nevertheless, the Eighth Circuit found that his due process rights had been violated. Logically, "both

[defendants' due process rights] were prejudiced by the prosecutor's actions or neither's were." *Drake*, 762 F.2d at 1479 (Clark, J., concurring). Furthermore, it is disingenuous of the state to argue that there is no violation of Stumpf's rights because the prosecutor had no knowledge of Eastman's testimony at the time of Stumpf's plea. The state learned of Eastman's testimony soon after Stumpf's plea and sentencing and yet continued to maintain that the convictions of both Stumpf and Wesley, each of which was obtained by arguing that a different individual was the shooter, were sound and reliable. n8 Indeed, as discussed below, the state maintained that Eastman's testimony was unreliable during a hearing on Stumpf's motion to vacate his plea and/or his sentence. To this day, there has been no suggestion of corrective action by the state.

n8 In fact, Wesley's counsel wanted to inform the jury that the prosecutor had previously argued that Stumpf, and not Wesley, was the shooter. The prosecutor argued that Stumpf had never admitted to firing the shots, and that his own argument was irrelevant. The trial court did not allow Wesley's counsel to discuss Stumpf's proceedings in front of the jury.

The state's second argument, with which the district court agreed, is that the identity of the shooter was not the critical issue in either trial and that therefore the use of different theories did not violate Stumpf's due process rights. By pleading guilty to capital murder, the state's argument goes, Stumpf admitted concerted action with Wesley in causing the death of Mary Jane Stout for the purposes of avoiding detection. All that was left for the prosecution then to prove, under this theory, was that Mrs. Stout was killed so that the defendant could escape detection for other crimes. But this argument ignores the fact that, as the aggravated murder statute existed in 1984, specific intent was a necessary element of the crime. See Ohio Rev. Code § 2903.01(B); see

also supra, pp.15-16. Because Stumpf never confessed to specific intent to kill Mrs. Stout, the prosecution bore the burden of proving beyond a reasonable doubt that Stumpf was guilty of the charge.

Finally, the state argues that irreconcilable theories were not used because Eastman's testimony was completely unreliable. State's counsel even asserted at oral argument that the state did not rely on Eastman's testimony in order to prosecute Wesley. This argument is just short of astounding, given the fact that in seeking to convict Wesley of aggravated murder, the prosecution offered no proof of the element of specific intent other than the theory that Wesley was the actual shooter. That the state relied on Eastman's testimony is evident from the fact that it presented his testimony to the jury, and from the fact that it prevented Wesley's counsel from presenting evidence of Stumpf's guilty plea. Had the state presented a theory of the crime consistent with the theory it asserted at Stumpf's evidentiary hearing, it would have had no need to keep that information from Wesley's jury.

The district court ultimately accepted the state's argument that the core issue at Stumpf's evidentiary hearing was not the identity of the shooter. However, in reaching this conclusion, the court started with what we believe to be a faulty assumption, *i.e.*, that "the state was not required to prove that petitioner was the actual shooter." The district court, in concluding that the specification to which Stumpf pleaded guilty, Ohio Rev. Code § 2929.04(A)(3), did not require that Stumpf be proven to be the "principal offender," overlooked, once again, the fact that the aggravated murder statute itself requires specific intent. See discussion supra pp.

15-16. The state was not required to prove that the petitioner was the actual shooter, but it was required to prove specific intent.

Even proceeding from the district court's false assumption, however, we cannot agree with the court's ultimate conclusion. The district court found that, although the state was not required to prove that Stumpf was the actual shooter, "the fact remains that the state did argue that petitioner was [the] actual shooter and the trial court did find that petitioner was the actual shooter." The district court went on to recognize that the trial court cited this very finding as "a reason, and a very substantial reason" that petitioner received the death penalty. The district court found, however, that habeas relief was not warranted, because the Supreme Court of Ohio's independent reweighing of the aggravating and mitigating circumstances cured any misplaced reliance on Stumpf having been the actual shooter. Apparently engaging in such a reweighing process, the Ohio Supreme Court concluded that Eastman's testimony was not sufficient to tip the balance of aggravating and mitigating factors.

We cannot agree with this reasoning, because we do not believe that a reweighing of the factors used to support imposition of the death penalty cures the due process violation at issue. The Ohio Supreme Court, it is true, found that "the testimony of a cellmate during Clyde Wesley's trial is of minimal credibility, especially in light of appellant's guilty plea and the substantial evidence to the contrary adduced during appellant's sentencing hearing." *State v. Stumpf*, 32 Ohio St. 3d at 106. But, putting aside for the moment the question of whether Eastman's testimony need be credible for a due process violation to be established by the state prosecution's presentation of and evident reliance on it, there is no explicit state court determination regarding Eastman's credibility to which this court must give deference. Although there is a presumption that a state court's factual findings are

correct, this presumption applies only to basic facts and to those facts implicitly established through the trial court's unique ability to judge the witnesses' credibility and demeanor. See *McQueen*, 99 F.3d at 1310. No court at any level considering Stumpf's claims actually observed Eastman's testimony. n9 The first court explicitly to examine the transcripts of that testimony, the two-judge trial panel, failed to make any factual findings, instead denying Stumpf's motion summarily. The Supreme Court of Ohio recognized as much when it found that the trial court had "apparently" determined that Eastman's testimony did not change the balancing of mitigating and aggravating factors. The Supreme Court of Ohio also presumably examined the transcripts, concluding that the testimony was of "minimal credibility." Neither the presumed factual finding by the trial court, nor the more explicit one made by the Supreme Court of Ohio is due the type of complete deference contemplated by the state, because neither of these courts had any better opportunity to judge Eastman's credibility than we do.

n9 Indeed, only two fact-finders actually observed Eastman's testimony. The jury at Wesley's trial obviously credited Eastman enough to find Wesley guilty. The trial judge, in pre-trial proceedings, made at least one credibility determination when he found that Eastman was not a government agent within the meaning of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). See *State v. Wesley*, 1986 Ohio App. LEXIS 8651 (1986).

Finally, the state presses an argument that Eastman's testimony was not credible because it relied on "the same type of implausible gun switching and gun juggling that Stumpf told." n10 This, of course, is beside the point. The pertinent fact for Stumpf's due process claim is not whether Eastman's gun-switching story is plausible, n11 but whether the prosecution relied on that story to secure Wesley's conviction.

The prosecution found Eastman's testimony credible enough to present the "implausible gun switching" theory to Wesley's jury and obtain his conviction on that theory.

> n10 Eastman testified at Wesley's trial that Wesley told him that after Stumpf had shot Mr. Stout, Stumpf panicked and dropped the .25 caliber Raven. Wesley then picked up the Raven and shot Mrs. Stout a few times. When Mrs Stout moaned, Wesley shot her again to make sure she was dead.
>
> n11 One could argue that this story is more likely to be plausible because it is so similar to Stumpf's account of the crime, which he recounted many months before Eastman testified.

In holding that a constitutional violation occurred in this case, we recognize that at least one circuit has suggested that a due process violation for the use of conflicting theories may be obviated when the second of two inconsistent theories results from the discovery of new evidence. See *Thompson*, 120 F.3d at 1058 ("when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime"). We have no quarrel with this proposition, to the extent that it is meant to acknowledge a state's need to continue to investigate crimes and to present all available evidence in court. However, in this case, although Eastman's testimony did not come to light until after Stumpf had been convicted and sentenced to death, the state had many opportunities to correct its use of conflicting theories. Stumpf, upon learning of the state's reliance on the theory that Wesley was actually the shooter, timely filed a motion to vacate his guilty plea and/or his sentence. The two judges hearing this motion expressed some concern over whether there was evidence that Stumpf was not in fact the shooter, but the state did not take that opportunity to advocate

that all the available evidence be presented to the sentencing panel.

A due process claim is a mixed question of law and fact and is therefore subject to *de novo* review. See *Williams v. Coyle*, 260 F.3d 684, 706-07 (6th Cir. 2000). Here, the proper standard of review is whether there is a reasonable probability that the prosecutor's use of inconsistent, irreconcilable theories rendered the conviction unreliable. See, e.g., *id.*, at 706-07; *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963); *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052(1984). A "reasonable probability" is a probability sufficient to undermine the outcome and is less than a preponderance of the evidence. See *Strickland* at 694; *Lyons v. Jackson*, 299 F.3d 588, 599 (6th Cir. 2002).

Measured against this standard, the state's due process violation mandates that both Stumpf's plea and his sentence be set aside. First, there is a reasonable probability that, had the prosecution not pursued conflicting theories concerning who was the actual shooter, Stumpf either would not have pleaded guilty or the three-judge panel would not have found a factual basis for the specific intent element of aggravated murder. Second, and perhaps more likely, there is a reasonable probability that, had the prosecution not pursued inconsistent theories, Stumpf would not have been sentenced to death.

As discussed at length above, it was necessary for the three-judge panel to find that Stumpf specifically intended the death of Mary Jane Stout in order for it to accept his plea to aggravated murder. See Ohio Rev. Code § 2903.01(D) ("no person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another"). The prosecution offered virtually no evidence regarding intent other than its contention that Stumpf shot

Mrs. Stout. Had the prosecution's alternate theory been heard by the three-judge panel, there is a reasonable probability that it would have found Stumpf guilty of something less than aggravated murder.

Moreover, there is more than a reasonable probability that the three-judge panel would not have sentenced Stumpf to death had the prosecution not employed inconsistent and irreconcilable theories. In explaining its reasoning for finding that the aggravating factors in Stumpf's case outweighed the mitigating factors (and therefore that Stumpf deserved the death penalty), the court's first pronouncement was that it had "found beyond a reasonable doubt that the Defendant was the principal offender in count one of the indictment," *i.e.*, the aggravated murder charge. In turn, this finding prevented the panel from concluding that Stumpf was *not* the principal offender, which would have been "a powerful mitigating factor." *State v. Green*, 90 Ohio St. 3d 352, 363, 2000 Ohio 182, 738 N.E.2d 1208, 1224 (Ohio 2000) (noting that "very few death sentences have been approved against persons who were not the principal offender"). In fact, during the hearing on Stumpf's motion to withdraw his guilty plea, one of the original panel members, Judge Bettis, stated:

> If we had not been satisfied that Stumpf was, in fact, the trigger man, the principal offender . . . that may very well have had an effect upon this Court's determination of whether the death penalty should follow. I'm not saying it would, but it's possible.

It is true that Judge Bettis made this comment during a hearing in which the panel had before it both a transcript of Eastman's testimony and evidence of the prosecution's reliance on that theory of the crime. However, the fact that the panel did not grant Stumpf's motion to withdraw his guilty plea does not dictate the conclusion that they did not find Eastman's testimony persuasive. First, in denying the motion

summarily, the panel stated, "The Court took the matter under advisement and after having considered the same, does overrule the Motion to Withdraw Former Plea and the Alternative Motion to Set Aside the Sentence Imposed." Because the court gave no basis for its ruling, the denial of relief could have been made on any number of grounds; it would be impossible to divine its reasoning. Hence, the panel's rejection of Stumpf's motion does not negate the conclusion that, had the prosecution's alternate theory been before the panel at a sentencing proceeding, there is a reasonable probability that the panel would not have sentenced him to death. Second, only two of the three judges on the original panel were still alive when Stumpf brought his motion. Stumpf's contention that his motion should have been heard by three judges was rejected by the Ohio Supreme Court:

> R.C. 2945.06 expressly provides that "the judges or a majority of them may decide all questions of fact and law arising upon the trial . . . ." Unanimity is mandated only when the panel finds a defendant guilty or not guilty. Whether appellant was entitled to withdraw his guilty plea or to a new sentencing hearing were questions of law, properly determined by a majority of the panel.

State v. Stumpf, 32 Ohio St. 3d 95, 105, 512 N.E.2d 598, 609 (Ohio 1987).

Under Ohio Rev. Code § 2945.06, then, only one judge's opinion was required to deny Stumpf's motion. However, under the same provision, unanimity was required as to questions of guilt and penalty. Because the third judge on Stumpf's panel died before the prosecution's alternate theory and Eastman's testimony came to light, the trial court's denial of Stumpf's motion can prove nothing as to whether that third judge, at the factual basis or mitigation hearings,

would have been persuaded by Eastman's testimony, and the state's reliance on it, that Stumpf should either not have been found guilty of aggravated murder, or should not have received the death penalty.

Finally, as petitioner points out, Ohio courts have held that reweighing of aggravating and mitigating circumstances by a higher court is not a cure for errors in the sentencing process, where the result of the weighing process, had the correct factors been present, is unknown. See *State v. Davis*, 38 Ohio St. 3d 361, 372, 528 N.E.2d 925, 936 (Ohio 1988) ("We cannot accept independent review as a cure in this particular action because we cannot know if the result of the weighing process by the three-judge panel would have been different had the impermissible aggravating circumstance not been present.").

IV. CONCLUSION

On the basis of the two claims addressed in this opinion, that Stumpf's guilty plea was not voluntary, knowing, and intelligent and that his due process rights were violated by the prosecution's use of inconsistent, irreconcilable theories to convict both him and his accomplice, we REVERSE the district court's decision and REMAND this case to the district court with instructions to issue the writ of habeas corpus in the petitioner's favor, unless the state elects to retry him within 90 days of the date of entry of the conditional writ. Because we are granting Stumpf relief on both his involuntary plea and due process claims, we need not reach his remaining arguments.

DISSENT BY: BOGGS

DISSENT

BOGGS, Chief Judge, dissenting. The court has reversed the district court's denial of a writ of habeas corpus on two grounds: that Stumpf's guilty plea was involuntary and unknowing, and that his due process rights in his own trial and sentencing were violated by the state's *later* use of evidence against another person. I disagree with both of these conclusions, and therefore respectfully dissent from the granting of the writ of habeas corpus.

I

I begin with the second of the court's two grounds, as I believe that is the more profoundly mistaken. The majority cites three cases from other circuits to buttress its theory that Ohio's prosecution of Wesley, which took place in April 1985, some seven months after Stumpf pleaded guilty and was sentenced to death, somehow violates Stumpf's due process rights. None of the three are germane to this case.

In *Thompson v. Calderon*, a celebrated California death penalty case, the court vacated a death sentence because the prosecutor presented two mutually incompatible theories for the rape-murder during contemporaneous trials of two defendants, Thompson and Leitch. *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc) (plurality), *vacated on other grounds*, 523 U.S. 538, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998). During the pre-trial proceedings for both men, and in Leitch's trial, the prosecutor's theory was that Leitch killed the victim, his girlfriend, because he wanted to get back together with his ex-wife; Thompson assisted him in the crime. *Id.* at 1055. In Thompson's trial, however, the prosecutor argued that Thompson had raped the victim and then killed her to cover up his act. He presented different jail house informants at each trial to bolster each contradictory theory. *Id.* at 1056. The Ninth Circuit held that this shift in arguments violated a prosecutor's duty to discover the truth

and that he was improperly trying to secure convictions for their own sake. *Thompson*, 120 F.3d at 1058-59; see, *e.g.*, *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935) (stating that the government's fundamental interest in a criminal prosecution is "not that it shall win a case, but that justice shall be done"). It also found that Thompson, who was tried first, was prejudiced due that the fact that "only in Thompson's trial did the prosecutor change the theory and the arguments [from those presented in the pre-trial hearing], and offer facts that directly conflicted with the underlying premise of the charges he brought." *Thompson*, 120 F.3d at 1059.

Distinguishing *Thompson* from the case before us is not difficult, however. First of all, the prosecutor in *Thompson* pursued the two mutually incompatible theories of the murder at contemporaneous trials after joint pre-trial proceedings, and deliberately chose witnesses who would tell the conflicting story that he needed to convict each defendant. Knowingly putting on false evidence is prosecutorial misconduct that violates the Due Process Clause. *Napue v. Illinois*, 360 U.S. 264, 269, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959). Nothing in this case indicates that the prosecutors deliberately presented false evidence: Stumpf pleaded guilty to aggravated murder with the specification of killing a witness and attempted aggravated murder with a firearm. The State had every reason to believe his over-all admission of responsibility. It was under no obligation, however, to accept at face value his assertion that he did not actually pull the trigger, especially in light of contradictory forensic evidence, such as the fact that a .25-caliber weapon killed Mrs. Stout, the same caliber as Stumpf's gun.

Nor did the prosecutor in *Thompson* collect new evidence between trials; he simply manipulated the facts that he had. In contrast, Wesley's trial took place seven months after Stumpf pleaded guilty, during which time informant

Eastman told prosecutors that Wesley confessed that he murdered Mrs. Stout. However, Wesley denied having confessed to Eastman, and the forensic evidence suggested that Eastman's statement was not airtight. A cursory comparison of the facts to those in *Thompson* therefore reveals that the California case has little application to our case. n1

> n1 It is worth noting that constitutional claim made in *Thompson* ultimately did not prevent the defendant's execution on July 14, 1998. *Calderon v. Thompson*, 523 U.S. 538, 566, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998) (reinstating the mandate denying habeas relief).

In *Drake v. Kemp*, an Eleventh Circuit case, the majority remanded for a new trial because the burden of proof was improperly shifted to the defendant and the prosecutor violated the defendant's rights during his closing arguments in the sentencing phase. *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (en banc). A single concurring judge argued that Drake's Fourteenth Amendment rights had been violated. The prosecutor, in trials that were a year apart, argued in one instance that a co-defendant must have committed the murder alone and, after having secured a conviction, argued that same person was not strong enough to commit the crime, and therefore Drake must have helped. The concurring judge concluded that it "seems inescapable that the prosecutor obtained Henry Drake's conviction through the use of testimony he did not believe; bringing this case under the logical if not actual factual framework of . . . *Napue*." *Drake*, 762 F.2d at 1479 (Clark, J. specially concurring). *Drake* therefore does not further Stumpf's case either: a concurring opinion that turns on the prosecutor's inferred knowledge that he was presenting false evidence does not comport with the facts in this case.

The last case cited by the majority, *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), is equally unconvincing. That case involved two groups of robbers, the first of which, when preparing to burglarize a house, discovered the second already in the process of stealing the homeowner's possessions. The two groups joined forces, and at some point during the crime the homeowners were murdered. *Id.* at 1047. The leader of the first group, Anthony Lytle, provided varying accounts of what happened, alternately claiming that the head of the second group, Michael Cunningham, killed the couple and that one of his (Lytle's) cohorts, James Bowman, was the murderer. *Id.* at 1047-48. The state convicted Jon Keith Smith, another member of Lytle's group, for felony-murder based on his association with purported fellow gang member Bowman, who was argued to be the actual killer. Four months later, the state then successfully prosecuted Cunningham for the same murders, based on Lytle's other story that Cunningham had already killed the couple when Lytle and his friends entered the house. *Id.* at 1048.

The Eighth Circuit ultimately granted Smith a writ of habeas corpus because the state's prosecution of Cunningham violated Smith's due process rights. *Ibid.* Again, the crux of the case was the deliberate presentation of false evidence: "In short, what the State claimed to be true in Smith's case it rejected in Cunningham's case, and vice versa." *Id.* at 1050. Only a showing of this kind of prosecutorial misconduct could support a claim, dubious as it might be, that Stumpf's constitutional rights were retroactively violated.

Although this court mentions the prosecution's knowledge of Eastman's subsequent statement concerning Wesley's alleged confession to being Mrs. Stout's killer, the court's decision does not rest on this knowledge. It is undisputed that the prosecution did not know of Eastman's statement at the time of Stumpf's conviction and sentencing. Nothing indicates that the prosecution cherry-picked facts in

order to confirm Stumpf's guilty plea in the evidentiary hearing. The majority does not argue that the prosecution was under any obligation to confess error in Stumpf's post-conviction proceedings or appeals, nor even to bring Eastman's statement to Stumpf's attention. There is simply no prosecutorial misconduct in this case that could retroactively implicate Stumpf's due process rights.

Groose does not "hold that prosecutors must present precisely the same evidence and theories in trials for different defendants. Rather [it] holds only that the use of inherently factually contradictory theories violates principles of due process." *Id.* at 1052. The majority remarkably expands this holding to conclude that *evidence* in a second case that contradicts a *guilty plea* in an earlier case can implicate due process rights. Stumpf pled guilty after a colloquy in which he indicated that he understood that he was waiving certain constitutional rights. A defendant's guilty plea is an "admission that he committed the crime charged against him." *North Carolina v. Alford*, 400 U.S. 25, 32, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970). Nothing in the record suggests that the prosecutor was remiss in relying on Stumpf's acknowledgment of guilt. See *Dickerson v. United States*, 530 U.S. 428, 450, 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000) (Scalia, J., dissenting) (observing that if a defendant voluntarily acknowledges wrong-doing, the "Constitution is not . . . offended by a criminal's commendable qualm of conscience or fortunate fit of stupidity). n2 Therefore, I do not see any grounds on which to base an allegation that the prosecution skewed the same set of facts in two different trials in order achieve two mutually incompatible guilty verdicts. This case has little or no similarity with the facts of *Thompson*, *Drake*, and *Groose*.

n2 Even assuming, *arguendo*, that the majority is correct that Stumpf pled guilty based on substandard legal advice, it does not follow that accepting the

acknowledgment of guilt amounts to prosecutorial misconduct, the prerequisite for finding a violation of Stumpf's constitutional rights. The majority argues that the plea was not voluntary, a conclusion I address *infra*, but the validity of the plea is an entirely different matter. However flawed a defendant's guilty plea might be, it cannot constitute a contradictory prosecutorial theory of guilt, as required in *Groose*.

Far more instructive is the Ninth Circuit's quite recent decision in *Shaw v. Terhune*, 353 F.3d 697 (9th Cir. 2003). The court held that imposing sentence enhancements on two defendants for personal use of a firearm during an attempted robbery and assault on a restaurant manager was not a violation of due process, although the testimony clearly indicated that only one perpetrator had held a gun to the manager's head. *Id.* at 701-02. When the first defendant, Shaw, learned of the conviction and sentence of his accomplice three years later, he filed a habeas petition, citing the California Court of Appeals decision upholding Watts's sentence which stated: "Indeed, the evidence adduced at trial, which presumably was available to the prosecutor prior to trial, tends to support the conclusion that the jury in [Shaw's] trial was mistaken." *People v. Watts*, 76 Cal. App. 4th 1250, 1259-61, 91 Cal. Rptr. 2d 1 (1999) (quoted in *Shaw*, 353 F.3d at 701) (bracket added in *Shaw*).

However, the *Shaw* court distinguished its case from *Thompson*, pointing to the fact that the prosecutor did not manipulate evidence—the same crucial distinction that is present in our case. *Shaw*, 353 F.2d at 702. Ambiguous evidence is not false evidence; "regrettable" tactics are not necessarily unconstitutional. *Id.* at 703-04. The fact of the matter is that no one but Wesley and Stumpf know who shot Mrs. Stout. The State is entitled to put on the available evidence to convince the finder of fact of guilt. As long as it

does so in a good faith manner, without manipulating or selecting out critical evidence, due process is not violated.

The *Shaw* court also speculated that if there were a constitutional violation, that Watts, the second defendant, rather than Shaw, would be the one who could argue the point. *Id.* at 704, n. 5. Similarly, I could understand a court accepting Wesley's claim that the prosecution could not honestly present evidence in *his* case that contradicted what the government had relied upon previously (a type of "prosecutorial estoppel"), or even that it could not present evidence that contradicted a position it was taking elsewhere. However, none of those theories can retroactively render unfair the fundamentally fair proceedings that Stumpf received.

Having indicated that I believe it is logically impossible for Stumpf's claim to succeed under these circumstances, I touch only lightly on the court's resolution of the question of "whether there is a reasonable probability that the prosecutor's use of inconsistent, irreconcilable theories rendered the conviction unreliable." (Maj. Op. at 40). Nothing that occurred in Stumpf's proceeding rendered the conviction unreliable. At most, the *existence* of Eastman's statement could be argued to have rendered the conviction unreliable, but then our analysis would simply be that of any newly discovered evidence, which proceeds against a more difficult background and which the court does not undertake. *United States v. O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986) ("Motions for a new trial based on newly discovered evidence are disfavored."); see, e.g., *Herrera v. Collins*, 506 U.S. 390, 400, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993) (stating the rule that habeas relief is not the proper remedy for a claim of judicial error based on newly discovered evidence, absent some constitutional flaw in the trial proceedings). It would indeed be bizarre if Eastman's statement could not undermine Stumpf's conviction by its own force, but introducing it into

another proceeding could do so. Following our court's decision, a prosecutor faced with the same dilemma in the future would be well advised not only to eschew reliance upon such potentially contradictory evidence in later proceedings, but presumably prevent any other prosecutor from doing so. He or she might even be forced deceitfully to disclaim a belief that a jury was entitled to hear such evidence. In sum, whatever the result might be were Wesley bringing the claim, I cannot agree to the principle of retroactive unconstitutionality propounded in this case.

II

With respect to Stumpf's claim attacking his guilty plea, the court's opinion appears to take no notice of the benefit that Stumpf in fact gained from pleading guilty. He first waived a jury trial, opting to contest the charges before a three-judge panel. He then pled guilty in return for the prosecution dropping some charges and specifications. It is axiomatic that acceptance of responsibility decreases the chances that the death penalty will be imposed. The sentencing court had three choices in sentencing Stumpf: life without parole for twenty years; life without parole for thirty years; and death. It made sound strategic sense for him to act in a way that would encourage the judges to choose one of the first two options.

Once Stumpf pled guilty, he was entitled to an evidentiary hearing before a three-judge panel to confirm that the evidence in the case supported his plea. Ohio Rev. Code Ann. § 2945.06. Under one strategic view of the facts, the panel might have been less likely than a jury to render a death verdict because it would have grasped the legal theory behind Stumpf's position that, while guilty of Mrs. Stout's murder, he was not actually the shooter, and therefore did not deserve the death penalty. Stumpf was arguably hoping for another benefit, namely the dismissal of the remaining specifications

to the charges against him that made him eligible for the death penalty. In Ohio "if the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice." Ohio R. Crim. P. 11(C)(3). Therefore, the majority is incorrect that Stumpf received no benefit at all from pleading guilty: he significantly improved his chances to avoid the death penalty, although in the end his strategy did not yield the desired result.

Despite the court's extensive exegesis of the "confusion" at the plea hearing itself, the events that took place at the sentencing hearing apparently were neither a surprise nor a disappointment, in the beginning, to the defendant or his counsel. In fact, the defense attorney stated that the prosecution's rendition of the plea agreement was accurate, (Maj. Op. at 16). No objection was made to the course of the sentencing hearing, nor was there any effort to withdraw the guilty plea at that point. It was only after the Eastman statement came to light that Stumpf attempted to withdraw his guilty plea. Similarly, at the "factual basis hearing" before the three-judge panel the defense did not attempt to say: "Wait a minute, we aren't able to make an argument that we thought we would be able to make at this stage." It made the argument. The three-judge panel heard and considered it. They simply were not persuaded.

Finally, it is true that Stumpf denied that he actually shot Mrs. Stout. Nevertheless, he knew that by pleading guilty, he would only be able to argue that Wesley in fact committed the murder as part of the mitigation phase of the proceedings. The majority asserts that there is evidence of a "serious misunderstanding," (Maj. Op. at 23), between the judge and Stumpf's lawyers. But no one was denying that Stumpf was involved in the murder of Mrs. Stout. His lawyers were laying the groundwork to argue that Stumpf was not the

triggerman and therefore did not deserve the death penalty. Stumpf would certainly be anxious to make that argument, and it is hardly surprising that, not knowing the precise point in the proceedings that it would be relevant, he would want to double-check that he would have an opportunity to argue this mitigating factor. The majority simply misinterprets Stumpf's caution as confusion.

Under these circumstances, it appears to me that Stumpf understood his legal strategy, executed it according to plan, and got exactly the opportunities that he bargained for, making the grant of a writ of habeas corpus unwarranted. Therefore, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3613

JOHN DAVID STUMPF, Petitioner-Appellant,
v.
BETTY MITCHELL, WARDEN, Respondent-Appellee.

Filed August 9, 2004

BEFORE: BOGGS, Chief Judge; DAUGHTREY and MOORE, Circuit Judges.

OPINION

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

* Judge Cook recused herself from participation in this ruling.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and

decision of the case. Accordingly, the petition is denied. Chief Judge Boggs would grant rehearing for the reasons stated in his dissent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DAVID STUMPF,
Petitioner,

v.

Case No. C-1-96-668
JUDGE SMITH
Magistrate Judge Kemp

CARL ANDERSON, Warden,
Respondent.

OPINION AND ORDER

Petitioner, a state prisoner sentenced to death by the State of Ohio following his plea of guilty to a charge of capital murder, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. §2254. On November 9, 1999, this Court issued an Opinion and Order finding that the following claims were barred by procedural default: 1.2, 1.4, 1.6, 1.10, 1.12, 1:14, 3, and 5a. This matter is now before the Court on the instant petition, respondent's return of writ, petitioner's traverse, and the state court record for a determination of the merits of petitioner's remaining claims.[1] The facts of this case are set forth in the Opinion and Order of November 9, 1999, and will be repeated here only to the extent needed to provide context for petitioner's merits arguments.

* * *

[1] Also before the Court are supplemental briefs filed by the parties pursuant to an order from this Court dated September 11, 2000. (Order, 09/11/200, doc. no. 22).

Second Claim for Relief

In his second claim for relief, petitioner argues that his guilty plea was not knowing, voluntary, and intelligent. As more fully described in the Court's November 9, 1999 Opinion and Order, petitioner and another individual, Clyde Daniel Wesley, participated in an armed robbery during which the victim in this case, Mary Jane Stout, was shot and killed. Petitioner has consistently maintained that Wesley fired the shots that killed Mrs. Stout. He has also admitted, however, to his participation in the robbery, and to shooting Mrs. Stout's husband, who survived the attack. Petitioner asserts that he derived no benefit from pleading guilty to the capital murder charge, that he never specifically affirmed his guilt during the plea colloquy, that he did not understand when he entered his guilty plea that he could still be sentenced to death, and that his counsel was ineffective for failing to advise him at that stage that he was not benefitting from the plea bargain and that he could still be sentenced to death. Petition at ¶¶38-47.

When a criminal defendant pleads guilty, he waives numerous fundamental constitutional rights --- including the right against compulsory self-incrimination, the right to trial by jury, and the right to confront his accusers. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Id.* at 242. In light of the numerous fundamental constitutional guarantees that a defendant forfeits when he pleads guilty, the state has the burden to demonstrate that the plea is voluntary, intelligent, and knowing. *Id*; *see also Garcia v. Johnson*, 991 F.2d 324, 326 (6th Cir. 1993). Generally, a plea is voluntary if it is not induced by threats or misrepresentations and if the defendant is advised of the direct consequences of the plea. *Brady v. United States*, 397 U.S. 742; 755 (1970). A plea is intelligent

if the defendant understands the rights that he waives. *Boykin v. Alabama*, *supra*, 395 U.S. at 243.

A determination of the voluntariness and intelligence of a guilty plea must be made upon an analysis of the totality of the circumstances. *Garcia*, 991 F.2d at 327; *see also Berry v. Mintzes*, 726 F.2d 1142 (6th Cir.), *cert. denied*, 467 U.S. 1245 (1984). When a defendant later challenges the plea in federal habeas corpus on the ground that it was not voluntary, intelligent, and knowing, the state generally satisfies its burden by producing a transcript of the state court proceedings. *Garcia*, 991 F.2d at 326; *Dunn v. Simmons*, 877 F.2d 1275, 1277 (6th Cir. 1989), overruled on other grounds by *Parke v. Raley*, 506 U.S. 20 (1992). A state court's factual finding that the plea was proper generally enjoys a presumption of correctness in federal habeas corpus. *Garcia*, 991 F.2d at 326; *Dunn*, 877 F.2d at 1277. But when the transcript is inadequate to show that a plea was voluntary and intelligent, the presumption of correctness is called into question. *Garcia*, 991 F.2d at 326; *see also Jones v. Parke*, 734 F.2d 1142, 1148 (6th Cir. 1984).

> Where the [guilty plea] is subsequently challenged, the state normally will attempt to demonstrate its effectiveness by introducing a transcript of the proceedings surrounding the trial court's acceptance of the guilty plea, and other trial court records. Where the records leave doubt as to whether the plea was in fact intelligent and voluntary, the state may look to evidence extrinsic to the court records, such as the recollection of those attending the plea proceedings. However, in the face of a record which is inadequate to demonstrate the regularity of proceedings at the time of a guilty plea's acceptance, the state must make a clear and convincing showing with

> extrinsic evidence that the plea was in fact intelligently and voluntarily entered.

Dunn v. Simmons, *supra*, 877 F.2d at 1277 (*citing Roddy v. Black*, 516 F.2d 1380, 1384 (6th Cr.), *cert. denied*, 423 U.S. 917 (1975)).

The record of state court proceedings surrounding the accepting of petitioner's guilty plea, although not a picture of clarity, is relatively straightforward. The furthest that the proceedings strayed from "regularity" actually came prior to petitioner's entering his guilty pleas. Jury selection began on August 20, 1984, after the trial court heard arguments on and eventually overruled defense counsel's motion to suppress statements. Jury selection abruptly ended on August 23, 1984, however, when petitioner apparently waived a jury trial. The proceedings resumed on September 17, 1984 before a three-judge panel, with Presiding Judge Henderson reading into the record the written jury waiver that petitioner had signed and filed on August 23, 1984.[4]

Immediately after reading that statement into the record, the trial court was advised by the prosecuting attorney that a plea agreement had been reached. The terms of that agreement, as they were set forth by the prosecuting attorney, are recounted here verbatim:

> MR SCOTT: Your Honor, the first matter that would be dealt with or the State would ask leave of Court pursuant to Criminal Rule 7(D) and Ohio Revised Code Section 2941.30 to amend by interlineation specification one to the first count of the Indictment in order that it may read as follows: The Grand Jurors further find and specify under

[4] It does not appear that any colloquy ensued between the trial court and petitioner regarding his waiver of a jury trial.

> Ohio Revised Code Section 2929.04(A)(3) in compliance with Ohio Revised Code Section 2941.14 that the aforesaid offense being the offense charged in the first count, the Aggravated Murder, was committed for the purpose of escaping detection, apprehension, trial or punishment for other offenses -- the words, "other offenses" are the first change, committed by the above named John David Stumpf, to wit: Aggravated Robbery and then we're adding the language "and Attempted Aggravated Murder". If that amendment is granted, the defendant then would enter a plea of guilty to the first count contained in the Indictment, being the Aggravated Murder count and a plea guilty to specification one to the first count as amended; would also enter a plea of guilty to the second count in the Indictment, being the offense of -- excuse me, back up. As to the first count he would also enter a plea of guilty to specification four to the first count. So, he will be pleading to the first count, the amended specification one to the first count and specification four to the first count. With regard to the second count, being the Attempted Aggravated Murder, he would enter a plea of guilty to the Attempted Aggravated Murder and a plea of guilty to the specification to the second count. If the pleas of guilty to the two counts and the specifications I've mentioned are accepted by the Court, the Court would then proceed under Criminal Rule 11(C)(3) to determine if there is a factual basis for the plea of guilty to the Aggravated Murder charge and the existence of the aggravating circumstances and if the pleas are accepted the State would then ask leave to enter a. nolle pros as to specifications two and three to the first count and also a nolle pros as to the third, fourth and fifth counts in the

> Indictment and including the specification to the third count.

(Transcript, 09/17/84, at 6-7). When asked by the trial court whether he "affirmatively acknowledged" the agreement as stated by the prosecuting attorney, petitioner answered, "Yes, sir." (Tr., 09/17/84, at 8). The trial court granted leave to amend the indictment as indicated above, and petitioner apparently initialed those changes. (*Id.* at 10).

The trial court then engaged petitioner and his attorneys in a colloquy to determine that his guilty pleas were voluntary, intelligent, and knowing. When asked whether they had fully investigated the facts and law, determined whether there existed any question as to the admissibility of statements and other evidence, and informed the petitioner of the elements of the offenses, as well as defenses and constitutional rights available to him, petitioner's counsel answered, "Yes, we have." (*Id.* at 11). Petitioner, after being sworn, then answered a series of questions posed by the trial court regarding the nature of the charges against him and the federal constitutional guarantees that he was forfeiting. Most important for purposes of this discussion, was the following exchange:

> JUDGE HENDERSON: For the first count, which is that of Aggravated Murder, you are subject to being -- to a sentence of twenty years without probation, that is, a sentence of life without probation for twenty years; a sentence of life without probation for a period of thirty years and the death penalty by electrocution could be imposed against you. Do you understand that, sir?
>
> THE DEFENDANT: Yes, sir.

(*Id.* at 14). Later, the trial court asked:

> JUDGE HENDERSON: Do you understand, Mr. Stumpf, that if any promises or inducements have been made to you by any person to cause you to plead guilty that they are not binding upon the Court, that if you plead guilty the Court, this panel of Judges, will decide your sentence after considering all of the evidence that is to be presented and evidence in mitigation of punishment and after considering a presentence investigation, report and recommendation approved and prepared by the probation department and that you may receive the maximum sentence prescribed by law. Do you understand that, sir?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: Have any promises or inducements been made to you, sir, other than the agreement which you have affirmatively acknowledged on the record.
>
> THE DEFENDANT: No, sir.

(*Id.* at 17-18). When the trial court then asked petitioner whether he was in fact guilty of the Aggravated Murder charge, defense counsel interrupted, at petitioner's behest, and explained that, although petitioner's answer would be "yes," it was petitioner's understanding that he would be given the opportunity to present evidence relevant to his conduct. (*Id.* at 18). Following that clarification, the trial court again asked petitioner whether he was "in fact guilty of the charge set forth in Count One, including specification one and specification four," to which petitioner responded, "Yes, sir." (*Id.* at 18-19).

After the plea colloquy, the trial court conducted an evidentiary hearing, as required under Ohio law with respect to guilty pleas in capital cases, to determine that there was a factual basis for petitioner's plea. The hearing, which began on September 18, 1984, concluded on September 20, 1984 with petitioner being found guilty of each offense to which he had pleaded guilty. Following the mitigation proceedings, the trial court reconvened on September 24, 1984 and sentenced petitioner to death on Count One.

Aside from the abrupt manner in which the trial proceedings shifted from jury selection to a three-judge panel facing a negotiated plea, the transcript of the proceedings surrounding petitioner's guilty plea suggests both an air of regularity and that petitioner's plea was voluntary, intelligent, and knowing. After the prosecuting attorney explained the plea agreement that had been reached, petitioner affirmatively acknowledged the agreement. (Tr., 09-17-84, at 6-8). Petitioner's attorneys affirmed on the record that they had investigated the facts and law relevant to the case, and had examined the admissibility of various statements and evidence. (*Id.* at 10-11). They further affirmed that they had informed petitioner of the elements of the offenses with which he was charged, of all the defenses that were available to him, and of all his constitutional rights. (*Id.* at 11). Petitioner personally acknowledged that his attorneys had informed and advised him as such. (*Id.* at 13). Petitioner also affirmed that he understood that, for the offense of aggravated murder, he was eligible for, among other penalties, death by electrocution. (*Id.* at 14). Later, he acknowledged an understanding that, regardless of what promises or inducements may have been made to him, punishment would ultimately be determined by the trial court and that the Court could impose the maximum sentence. (*Id.* at 17-18). Finally, petitioner answered that he was in fact guilty of the offense of aggravated murder -- albeit, only after a statement by defense counsel emphasizing that petitioner had requested counsel to

explain to the trial court that petitioner would answer that he was guilty, with the understanding that he would have the opportunity to present evidence relevant to his conduct. (*Id.* at 18-19). Petitioner averred that he was not under the influence of drugs or alcohol, and the transcript does not suggest otherwise. (*Id.* at 13-14). All of the foregoing indicates a plea that was voluntary, intelligent, and knowing.

With respect to petitioner's argument that he derived no benefit from pleading guilty to the aggravated murder offense, that might appear, in hindsight, to be true. But criminal defendants who make solemn admissions and declarations under oath will not be permitted to challenge the voluntariness of an otherwise valid plea -- made with a professed understanding of the nature of the charges, the rights waived, and the direct consequences including the maximum possible sentence -- simply because they ultimately did not obtain the results they had desired.

> A guilty plea invariably is made without complete foresight of the possible outcome of alternative procedures that might have been undertaken. Thus, an accused, with the assistance of his attorney, must examine the evidence which the Government has amassed against him, consider possible defenses, weigh the costs and benefits of proceeding to trial and ultimately decide, in light of the information then available, whether to enter a guilty plea. There is no guarantee that the accused will make the correct decision or that in hindsight such plea will not reflect an error in fact or judgment. Such uncertainty, which after all is the linchpin of every plea bargain, is inherent in a guilty plea and does not make the plea involuntary.

United States v. Turner, 881 F.2d 684, 686-87 (9th Cir.), *cert. denied*, 110 S.Ct. 199 (1989) (*quoting Johnson v. United*

States, 539 F.2d 1241, 1243 (9th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977)). *See also McMann v. Richardson*, 397 U.S. 759, 769-771 (1970) ("a guilty plea is not rendered involuntary merely because in hindsight the defendant wishes he had chosen a different course of action."); *United States ex rel. Curtis v. Zelker*, 466 F.2d 1097, 1098 (2d Cir. 1972) ("a defendant's mistaken subjective impressions gained from conferences with his legal counsel, in the absence of substantial objective proof showing that they were not reasonably justified, do not provide sufficient grounds upon which to set aside his guilty plea."), *cert. denied*, 410 U.S. 945 (1973).

As the Court noted above, petitioner affirmatively acknowledged his understanding of and agreement with the plea negotiations, as they were explained on the record by the prosecuting attorney. Ordinarily, "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). That said, the Court acknowledges that the prosecuting attorney's explanation of the plea arrangements was somewhat difficult to follow, and that criminal defendants in such situations will often answer questions posed by the trial court without a clear understanding of each and every term uttered -- especially if advised by counsel to do just that. Prophylactic colloquies designed to foreclose subsequent attacks are "neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations." *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (per curiam); see also *Machibroda v. United States*, 368 U.S. 487, 494-96 (1962); *Blackledge*, *supra*, 431 U.S. at 74-75; *United States v. Todaro*, 982 F.2d 1025, 1030 (6th Cir.), *cert. denied*, 508 U.S. 943 (1993). However, the Court is faced with a transcript revealing a comprehensive colloquy between the trial court and petitioner, during which petitioner professed an understanding of the nature of the charges against him, the rights that he was waiving, and the direct consequences of his

plea -- including the maximum possible sentence, that being death. In light of the foregoing, petitioner's argument that he derived no benefit from the plea bargain does not persuade the Court that his plea was not voluntary and intelligent.

Another argument advanced by petitioner in support of his challenge to the validity of his guilty plea is that he never actually affirmed that he was guilty of the aggravated murder offense. Petitioner's assertion is belied by the record. As the Court discussed above, petitioner answered, when asked by the trial court whether he was in fact guilty of the offense of aggravated murder, that he was -- albeit, only after a statement by defense counsel emphasizing that petitioner had requested counsel to explain to the trial court that petitioner would answer that he was guilty, with the understanding that he would have the opportunity to present evidence relevant to his conduct. (Transcript, 09/17/84, at 18-19). That petitioner's attorney qualified petitioner's position with respect to the question of whether he was in fact guilty of aggravated murder does not diminish or otherwise undermine the answer that petitioner ultimately gave under oath -- namely, yes, that he was in fact guilty of aggravate murder. "[A] temporary qualification of position by the defendant is not sufficient to rebut the presumption of correctness of state court proceedings, and to support a finding that [the defendant] did not understand the nature of his plea." *Garcia v. Johnson*, *supra*, 991 F.2d at 327. Petitioner will not now be heard to assert that he never actually affirmed that he was guilty of aggravated murder.

Petitioner also argues, in support of his challenge to the validity of his guilty plea, that he did not understand that he would still be eligible for the death sentence. Again, petitioner's assertion is belied by the record. As the Court discussed above, when the trial court asked petitioner whether he understood that, by pleading guilty to the aggravated murder offense and specifications, he would be eligible for a

life sentence with possibility of parole in twenty years, a life sentence with possibility of parole in thirty years, or death by electrocution -- petitioner answered, "yes, sir." (Transcript, 09/17/84, at 14). Later, petitioner acknowledged that he understood that, regardless of inducements or representations that may have been made to him, the trial court alone would decide his punishment- and the trial court could impose the maximum sentence. (*Id.* at 17-18). Petitioner gave his answers on the record and under oath. His after-the-fact assertion that the answers he gave then were false, while the assertions he makes now are true, is an insufficient basis for determining that his plea was not knowing or voluntary.

Further, petitioner was represented by counsel, and, no doubt, discussed possible sentences with his attorney. "[I]t taxes credibility to suggest that the paramount question of sentence, from the point of view of the accused, would have remained unexplored in the attorney/client conferences." *Berry v. Mintzes*, 726 F.2d 1142, 1149 (6th Cir.), cert. denied, 467 U.S. 1245 (1984). Defense counsel were well aware that petitioner was eligible for the death sentence. During the evidentiary hearing to determine that a factual basis existed for petitioner's guilty pleas, one of petitioner's attorneys noted in his opening statement that it was necessary to determine whether there was also a factual basis for the first specification to the aggravated murder count, "being the specification which does authorize the death penalty in this case." (Transcript, 09/17/84, at 35). It seems highly unlikely, in the absence of evidence to the contrary, that defense counsel did not apprise petitioner that he was eligible for the death penalty. Thus, above and beyond what is evident from the transcript of the plea colloquy -- namely, that petitioner stated under oath not once, but twice, that he understood that he was eligible for the death sentence -- the fact that petitioner was represented by counsel bolsters this Court's conclusion that possible sentences, including death, were discussed when

considering whether petitioner should enter a guilty plea to the aggravated murder sentence.

Petitioner further argues that his plea was not voluntary and intelligent, due to the ineffectiveness of his attorneys in not informing him that he would derive no benefit and that he would still be eligible for the death penalty. As discussed above, the Court must proceed with caution in the face of after-the-fact assertions that what petitioner said under oath during the plea colloquy was false, while what he asserts now is true. During the plea colloquy, petitioner's attorneys affirmatively acknowledged that they had advised petitioner of the nature of the charges that he faced, of his possible defenses, and of the rights that he was waiving. Petitioner, who was present during that exchange between the trial court and defense counsel, confirmed that his attorneys had advised and informed him as such. The Court has before it a transcript that indicates a knowing, intelligent, and voluntary plea. The only evidence that petitioner has introduced to challenge the validity of his pleas, as well as the apparent regularity of the state court proceedings, is his own affidavit, first submitted to the trial court as an exhibit to his postconviction action. Although the Court is neither free, nor inclined, to disregard that affidavit altogether, that affidavit, without more, does not permit the Court to dismiss the validity of answers and a plea of guilty given by petitioner on the record and under oath. *See Cuppett v. Duckworth*, 8 F.3d 1132, 1139 (7th Cir. 1993), *cert denied*, 510 U.S. 180 (1994); *Dempsey v. Wainwright*, 471 F.2d 604, 607 (5th Cir.), *cert denied*, 411 U.S. 968 (1973); *see also Faught v. Cowan*, 507 F.2d 273, 275 (6th Cir. 1974), *cert denied*, 421 U.S. 919 (1975).

It is evident from the record that defense counsel's strategy was to demonstrate during the evidentiary hearing, as well as the mitigation hearing, that petitioner did not fire the shots that killed the victim, and that the death penalty, accordingly, was either not authorized or not appropriate. This

is amply demonstrated by the record, and petitioner has not sufficiently rebutted either the regularity of the plea proceedings, or that counsel's choices were borne from neglect and a dereliction of duty, as opposed to reasoned trial strategy.

For all of these reasons, the Court concludes that petitioner's second claim for relief is without merit.

* * *

Fifth Claim for Relief

In his fifth claim for relief, petitioner asserts ineffective assistance of appellate counsel on direct appeal to the Court of Appeals. Specifically, petitioner asserts that his appellate attorneys were constitutionally deficient for failing to raise the following issues on appeal:

5.1 That the trial court erred in failing to file findings of fact and conclusions of law in connection with its rejection of petitioner's motion to suppress statements;

5.2 That the trial court erred in finding a sufficient factual basis for petitioner's guilty plea since, there is insufficient evidence demonstrating that petitioner possessed specific intent to kill Mrs. Stout;

5.3 That the trial court abused its discretion in failing to grant petitioner's request for a change of venue;

5.4 That the trial court abused its discretion in accepting petitioner's guilty plea without explaining the nature of the charge as

required by state rules of criminal procedure and constitutional law;

5.5 That the prosecutor made improper comments regarding the unsworn nature of petitioner's statement in mitigation;

5.6 Appellate counsel's failure to ensure that the presentence investigation report was made a part of the record on appeal; and

5.7 That trial counsel had been ineffective for failing to fully develop the record on the involuntary nature of petitioner's guilty plea.[12]

The Court will discuss the controlling standard for claims of ineffective assistance of appellate counsel and then address each of petitioner's allegations separately.

The Strickland test applies to appellate counsel. *Burger v. Kemp*, 483 U.S. 776 (1987). Counsel must provide reasonable professional judgment in presenting the appeal. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). "[W]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (*quoting Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). The Court of Appeals for the

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[12] As the Court noted in its earlier procedural default order, the habeas corpus petition includes two claims designated as the "fifth claim for relief." The first "fifth claim" is comprised of the allegations designated by the Court as 5.1 through 5.6. The only allegation of the second "fifth claim" that was properly presented to the state courts, and that is entitled to a review on the merits by this Court, is designated

Sixth Circuit has identified the following considerations that ought to be taken into account in determining whether counsel on direct appeal performed reasonably competently:

(1) Were the omitted issues "significant and obvious?"
(2) Was there arguably contrary authority on the omitted issues?
(3) Were the omitted issues clearly stronger than those presented?
(4) Were the omitted issues objected to at trial?
(5) Were the trial court's rulings subject to deference on appeal?
(6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
(7) What was appellate counsel's level of experience and expertise?
(8) Did the petitioner and appellate counsel meet and go over possible issues?
(9) Is there evidence that counsel reviewed all the facts?
(10) Were the omitted issues dealt with in other assignments of error?
(11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Mapes v. Coyle, 171 F.3d 408, 427-28 (6th Cir.), *cert. denied*, 528 U.S. 946 (1999). The Sixth Circuit cautioned, however, that this list is not exhaustive and need not produce a certain "score." *Id* at 428. The Court will now turn its attention to each allegation of appellate counsel ineffectiveness asserted by petitioner.

* * *

5.2 Trial Court's Determination That There Was Factual Basis for Guilty Plea

Petitioner argues that his appellate attorneys were constitutionally ineffective for failing to challenge on appeal the trial court's determination that there was a sufficient factual basis to support petitioner's guilty pleas. Specifically, petitioner asserts that specific intent is the requisite culpability and that there was insufficient evidence, demonstrating that he possessed specific intent to kill the victim. Petitioner argues, therefore, that his attorneys were ineffective for not challenging on appeal the trial court's determination that there was a factual basis supporting his guilty pleas to aggravated murder and the "escaping detection" specification.

The Court is not persuaded that petitioner's attorneys were ineffective in this regard. Although the issue whether there was a sufficient factual basis supporting petitioner's guilty pleas seems, at first glance, to be an obvious issue for, appeal, given the fact that petitioner steadfastly maintained, even while pleading guilty, that it was his co-defendant Daniel Wesley, who had actually shot and killed Mrs. Stout, it cannot be said under Strickland that petitioner's attorneys were constitutionally deficient, or that petitioner was prejudiced, by the omission of this issue from the appeal. Initially, it bears repeating, with respect to petitioner's insistence that his co-defendant was the triggerman, that petitioner pleaded guilty to the offense of aggravated murder and the "escaping detection" specification. That is, petitioner stood in open court and stated, under oath, that he had purposely killed Mrs. Stout and that he had done so for the purpose of escaping detection, apprehension, trial, or punishment for the offense of aggravated robbery. Moreover, there was circumstantial evidence and testimony placing the murder weapon in petitioner's hand and establishing

petitioner as the one who fired the fatal shots."[15] With that in mind, the Court notes first that counsel may very well have elected not to challenge the factual basis for petitioner's guilty plea, since there was sufficient evidence from which a reasonable factfinder could have found, beyond a reasonable doubt, specific intent to kill. Evidence and testimony revealed a methodical, calculated entrance into the Stout home by petitioner and Wesley for the purpose of committing robbery; that multiple gunshots were fired into the heads of Mr. and Mrs. Stout at point blank range; that petitioner and Wesley had reason to fear that they wold be identified by the Stouts; and that petitioner and Wesley fled the Stouts' home, leaving them to die. Thus, counsel may very well have determined that this issue was not stronger than the issues they ultimately presented on appeal. *Mapes*, *supra*, 171 F.3d at 427-28. Moreover, the issue of whether there was a sufficient factual basis supporting petitioner's guilty pleas to aggravated murder and the "escaping detection" specification were essentially dealt with in other assignments of error concerning the trial court's decision not to permit petitioner to withdraw those guilty pleas. Id. Having reviewed the record, the Court cannot say that the decision not to pursue this issue on appeal was "an unreasonable one which only an incompetent attorney would adopt." Id. For these reasons, the Court rejects petitioner's claim that his attorneys on appeal were ineffective for failing to assign as error the trial court's determination that there was a factual basis supporting petitioner's guilty pleas.

* * *

5.4 Trial Court's Failure to Explain Nature of Charge

[15] The Court is mindful, just as the state courts were, of affidavits and transcripts from the subsequent trial of Clyde Daniel Wesley, filed by petitioner in support of his motion to withdraw his guilty plea, attempting to show that Wesley had confided to a cellmate that he, and not petitioner, had actually killed Mrs. Stout.

When Accepting Guilty Plea

Petitioner argues in claim 5.4 that his appellate attorneys were ineffective for failing to challenge on appeal the fact that the trial court accepted petitioner's guilty plea without explaining the nature of the charges to which he was pleading guilty; Although there arguably is some substance to petitioner's allegations, the Court is not persuaded that petitioner was prejudiced by appellate counsel's oversight.

The first prong of the Strickland test requires the Court to determine whether counsel committed an error or omission that was objectively unreasonable. The Court accomplishes this task by examining whether the issue omitted from the appeal was not only viable, but one that no competent attorney reasonably would have foregone. Under Ohio law, a trial court's responsibilities in ensuring that a guilty plea is made voluntarily are spelled out in Ohio R. Crim. P. 11 (C)(2):

> In felony cases the court *** shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved***.
>
> (b) Informing the defendant and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testier against himself or herself.

The Ohio Supreme Court has held that, although strict compliance with Rule 11(C)(2) is preferred, substantial compliance is sufficient, so long as the totality of the circumstances demonstrate that the plea was voluntary. *State v. Carter*, 60 Ohio St. 2d 34, 38 (1919); *State v. Stewart*, 51 Ohio St. 2d 86 (1977). With respect to ensuring that a defendant enters a guilty plea "with understanding of the nature of the charges," although Ohio courts have stopped short of requiring trial courts to explicitly inform the defendant of each element of the offense or to specifically ask the defendant if he understands the nature of the charge, there must be some basis in the record justifying a finding by the trial court that the defendant understands the charge. See *State v. Rainey*, 3 Ohio App. 3d 441 (Ohio app. 10 Dist. 1982); *see also State v. Blair*, 128 Ohio App. 3d 435 (Ohio App. 2 Dist. 1998)(defendant's affirmative response to whether he understood nature of attempted rape charge against him was, by itself, insufficient to support finding that he understood what state would have to prove where there was nothing in record to support finding that defendant was advised, by anyone, of what state would have to prove to convict him); *In re Flynn*, 101 Ohio App. 3d 778 (Ohio App. 8 Dist. 1995)(trial court is not required to inform defendant of each element of the offense, but must ensure that defendant understands the charge); *State v. Swift*, 86 Ohio App. 3d 407 (Ohio App. 11 Dist. 1993)(trial court is required to clear up

confusion on defendant's part as to element of crime before it can accept guilty plea).

In the instant case, it appears that the trial court substantially complied with Ohio R. Crim. P. 11(C)(2) when accepting petitioner's guilty pleas. The trial court informed petitioner of the constitutional, rights to which he was entitled and ensured that he understood he was waiving those rights; inquired whether petitioner was under the influence of drugs, alcohol, or mental defect that might impair his voluntariness; advised petitioner of the maximum penalties that he faced; inquired whether petitioner's guilty pleas had been obtained through promises, inducements, or threats; and, inquired whether petitioner had discussed his plea and was satisfied with his attorneys. (Mitigation transcript, at 11-18). The trial court did not inquire into petitioner's educational background in ascertaining whether he was capable of understanding the charges to which he was pleading guilty or the consequences of his guilty pleas. The trial court also failed to inform petitioner of the elements of the charges to which he was pleading or to inquire whether he understood the charges. The trial court did, however, inquire of petitioner's attorneys whether they had explained the elements of the offenses to petitioner. (Mitigation transcript, at 11). From the plea colloquy as a whole, there appears to be a basis in the record justifying the trial court's finding that petitioner entered his guilty pleas "with full knowledge of the nature of the accusation and the consequences of the pleas," (Mitigation transcript, at 23), though that basis appears to have been somewhat scant.

Further, there were intimations at the time that petitioner entered his guilty pleas, as well as outright declarations in his subsequent appeals and collateral attacks, that petitioner did not fully grasp the nature of the charges to which he was pleading guilty. During the plea colloquy, when the trial court asked petitioner whether he was in fact guilty of the

aggravated murder charge and specifications one and four to that charge, petitioner did not immediately answer, prompting defense counsel to interject:

> MR. STEPHENS: One moment, Your Honor. Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of the his right to present evidence at a later time relative to his conduct, but he'll respond to that.

(Mitigation transcript, at 18). After petitioner's pleas had been accepted and petitioner had been sentenced to death, when petitioner later sought to withdraw his plea and to attack his conviction and sentence in postconviction, he asserted, (as he continues to assert here), that he did not understand that he was admitting to the actual shooting of Mary Jane Stout and that he only pleaded guilty because he was led to believe that he would be able to present evidence demonstrating that he was not the shooter, *i.e.*, the principal offender.

The trial court's failure to explain more fully the nature of the charges is fairly characterized as a non-frivolous, viable issue worthy of appeal. The trial court did not notify petitioner of the elements of the offenses to which he was pleading guilty and did not specifically ask him whether he understood the charges. The only basis supporting the trial court's finding that petitioner understood the nature of the charges was defense counsel's affirmative response to the trial court's question as to whether counsel had explained the elements of the offenses to petitioner. That petitioner denied being the actual shooter, or principal offender, was evidenced first in his reluctance to answer when the trial court asked whether he was in fact guilty of shooting Mrs. Stout and then throughout the hearing to determine whether there was a factual basis for his pleas, when he fought to establish that it as his co-defendant, and not he, who had actually shot Mrs. Stout. The

foregoing suggests that appellate counsel omitted a significant and obvious issue when they failed to assign as error the trial court's failure to explain the nature of the charges when it accepted petitioner's guilty plea. A tactical reason for not raising this issue on appeal is not readily apparent. It is likewise difficult to characterize this issue as one that a competent attorney could understandably overlook. Hence, petitioner has arguably satisfied the deficient performance prong of the Strickland test.

It is not enough, of course, for petitioner to demonstrate that appellate counsel's conduct fell below that of a reasonable attorney under prevailing professional norms. Petitioner must also show that, but for appellate counsel's error, the appeal would have resulted in a different outcome. *Strickland*, *supra*, 466 U.S. at 694; *Tucker v. Prelesnik*, 181 F.3d 747, 754 (6th Cir. 1999). The prejudice inquiry has been defined in terms of whether counsel's errors were so egregious as to undermine reliability of and confidence in the result of the proceedings. *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996), *cert. denied*, 521 U.S. 1131 (1997); *see also Lockhart v. Fretwell*, 506 U.S. 364, 369-370 (1993). The prejudice prong serves an important function -- namely, to ensure that otherwise valid criminal judgments are not lightly overturned because of attorney error that, in the end, did not prejudice the rights of the defendant or undermine the confidence in or reliability of the proceeding. *Cf. Lockhart*, *supra*, 506 U.S. at 368-69 (holding that the right to effective assistance of counsel is recognized not for its own sake but because of the effect it has on ability of the accused to receive a fair trial). Under the prejudice prong, even assuming that appellate counsel could objectively be faulted for not raising the trial court's failure to explain the nature of the charges, the Court cannot find that petitioner was prejudiced by that error because it does not appear that the state courts in this case would have accepted petitioner's argument about the trial court's failure to instruct on the elements of the offense. That

is, the Court cannot find that appellate counsel's failure to raise that issue undermined the reliability of the outcome of petitioner's appeal. This Court finds that appellate counsel's failure to challenge the fact that the trial court did not explain the nature of the charges does not undermine the reliability of or confidence in the result of petitioner's appeal.

As noted supra, the failure of a trial court to use, the exact language contained in Ohio R. Crim. P. 11(C) does not provide a basis for vacating the appeal. *See State v. Anderson*, 108 Ohio App. 3d 5, 9 (Ohio App. 9 Dist. 1995). "With respect to constitutional rights, the trial court's acceptance of a guilty plea will be affirmed if the court engaged in a meaningful dialogue with the defendant which, in substance, explained the pertinent constitutional rights "in a manner reasonably intelligible to that defendant." *Id* (*quoting State v. Ballard*, 66 Ohio St. 2d 473, paragraph two of the syllabus (1981)). So long as the totality of the circumstances demonstrate a basis for the trial court's finding that the defendant understood the nature of the offense to which he was pleading guilty, the failure of the trial court to explicitly ask whether the defendant understood the nature of the offense does not provide a basis for attacking the constitutionality of the plea. *See, e.g., State v. Rainey*, 3 Ohio App. 3d 441, paragraph two of the syllabus (Ohio App. 10 Dist. 1982). The record reveals that the trial court received assurances from defense counsel that the nature and elements of the offense had been explained to petitioner and that petitioner was entering his guilty plea with a full understanding of the nature of the offense. That being so, it is highly unlikely that the state appellate court would have accepted petitioner's arguments about the failure of the trial court explicitly to ask him whether he understood the nature of the offense. *State v. Carter*, 60 Ohio St. 2d 34 (1974)(finding no error where trial counsel had given assurances that defendant understood nature of offense to which he was pleading guilty). Even assuming, therefore, that

appellate counsel erred in not raising this issue on appeal, appellate counsel's omission did not prejudice petitioner. The Court is constrained to rejected claim 5.4.

* * *

5.7 Trial Counsel's Failure to Develop Record re: Voluntariness of Plea

Finally, petitioner asserts that his appellate attorneys were constitutionally ineffective for not challenging on appeal the failure of petitioner's trial attorneys, in connection with petitioner's motion for a new trial, to develop more fully evidence demonstrating that petitioner's pleas were not entered knowingly, intelligently, or voluntarily. For reasons discussed more fully above, the Court is not persuaded that appellate counsel omitted an issue of significant and obvious strength because it is clear from the decisions of the appellate court and the Supreme Court of Ohio that they conducted a full review of the circumstances surrounding petitioner's guilty plea, and of the subsequent allegations regarding the fact that petitioner's co-defendant escaped a death sentence following his trial, and concluded that-petitioner's plea had been voluntary and that petitioner was not entitled to withdraw his plea. That being so, it cannot be said that appellate counsel unreasonably ignored an issue significantly and obviously stronger than those appellate counsel did raise on appeal, or that petitioner was prejudiced by the omission.

* * *

Seventh Claim for Relief

In his seventh claim for relief, petitioner asserts that the trial court improperly denied his motion to vacate his sentence or, in the alternative, to withdraw his guilty plea based on new evidence. The new evidence offered by petitioner, which

evidence had not been previously available to him, was testimony presented by the state during Clyde Daniel Wesley's subsequent trial claiming that it was Wesley, and not petitioner, who had shot and killed Mary Jane Stout. According to Wesley's cellmate, Wesley had confessed to him that, after petitioner shot Mr. Stout with the chrome .25 caliber pistol, petitioner dropped that pistol and ran. Wesley then picked up the pistol and shot Mrs. Stout. Petitioner argues that the new evidence, *i.e.*, the testimony of Wesley's cellmate implicating Wesley as the actual shooter, entitled petitioner to withdraw his guilty plea or, in the alternative, to have a new sentencing hearing. By far the most troubling of petitioner's claims, this assertion, along with a recent decision by the Court of Appeals for the Eighth Circuit prompted the Court to order the parties to submit supplemental briefs.

In *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), *cert. denied*, *Gammon v. Smith*, -- S.Ct.-- 2000 WL 1337423 (Nov. 6, 2000), the Eighth Circuit granted a writ of habeas corpus because the state had violated the petitioner's due process rights when it presented factually inconsistent and irreconcilable evidence during different trials to obtain the convictions of two different defendants for the same murders. During the petitioner's trial, the prosecution relied on one of a co-defendant's two inconsistent versions of the events to obtain petitioner's conviction for the murders, and then relied on the other version at a subsequent trial to convict someone else of the same murders. Pointing to the prosecution's use of "diametrically opposed testimony" during different trials to obtain convictions of different defendants for the same murders, as well as the fact that the petitioner could not have been convicted of felony murder under both theories, the Eighth Circuit found that the prosecution's actions rose to the level of a due process violation.

After the decision in *Smith v. Groose*, this Court directed the parties to file supplemental briefs addressing

whether, or to what extent, the Eighth Circuit's decision might apply to petitioner's case. Petitioner argued that his conviction violates his rights under the Due Process Clause and must be set aside because the prosecution secured convictions against him and subsequently against Clyde Daniel Wesley by arguing that each had been the actual shooter. Respondent asserted that *Smith v. Groose* does not apply to petitioner's case since petitioner could have been convicted and sentenced to death even under the arguments and evidence that were presented during Wesley's subsequent trial, as an aider and abettor; neither the aggravated murder count nor the capital specification to which petitioner pleaded guilty required that he be the principal offender. The Court is constrained to agree.

The factually inconsistent and irreconcilable evidence at issue concerns who was the actual shooter, i.e., petitioner or Clyde Daniel Wesley. During petitioner's culpability and penalty hearings, the state argued that petitioner shot and killed Mary Jane Stout. Later, during Wesley's trial, the state argued and presented testimony that Wesley shot and killed Mary Jane Stout. The critical difference between this case and Smith is that here, it was not necessary for the state to argue or prove beyond a reasonable doubt, nor was it necessary for the trial court to find, that petitioner was the actual shooter, *i.e.*, "principal offender." That is, petitioner

could have been convicted and sentenced to death as charged under the arguments and testimony presented during Wesley's trial.

Neither the aggravated murder count, nor the capital specification to which petitioner pleaded guilty, included as an element that petitioner was the actual shooter or "principal offender." Petitioner's indictment did not include a complicity, *i.e.*, aiding and abetting, count. Indeed, all indications from petitioner's indictment were that the state would proceed against petitioner as the actual shooter. Thus, petitioner's indictment was silent as to whether the state would proceed against him as the principal offender or as an aider and abettor. Under Ohio's aiding and abetting statute, however, it is not necessary for a defendant be charged as an aider and abettor to be convicted under aider and abettor liability; that a defendant is charged with a criminal offense is considered sufficient to place him on notice that the state could seek to convict him as either the principal offender or and aider and abettor. Subsection (F) of Ohio's aiding and abetting statute provides in relevant part that a charge of complicity may be stated in terms of that section or in terms of the principal offense. R.C. §2932.03(F). Ohio courts have construed R.C. §2923.03(F) to mean that a complicity conviction will be sustained under an indictment solely employing terms of the principal offense without an amendment to the indictment. *State v. Ensman*, 77 Ohio St 3d 701, paragraphs one, two, and six of the syllabus (1991); *see also State v. Dotson*, 35 Ohio App. 3d 135 (Ohio App. 3 Dist. 1987)(holding that complicity statute allows defendant to be indicted either as the principal offender or as aider and abettor because statute gives sufficient notice that state could proceed against defendant under either theory).

Citing *State v. Taylor*, 66 Ohio St. 3d 295 (1993), petitioner asserted that, under Ohio law, a defendant convicted of aggravated murder and a capital specification

under aiding and abetting liability is not eligible for the death penalty. His assertion is not entirely accurate and his reliance on Taylor is misplaced. In Taylor, the defendant argued that the evidence was insufficient to establish the R.C. §2929.04(A)(7) death penalty specification attached to each aggravated murder count of which he had been convicted under aiding and abetting liability. The death penalty specification set forth in RC. §2929.04(A)(7) requires proof either that, the defendant was the principal offender or, if the defendant was not the principal offender, that the aggravated murder was committed with prior calculation and design. The defendant in Taylor argued that there was no proof either that he was the principal offender or that the aggravated murder was committed with prior calculation and design. The Supreme Court of Ohio agreed. With respect to the "principal offender" element, the court held that, while a defendant can be convicted of aggravated murder without being the actual killer, but by aiding and abetting the actual killer, such a finding cannot be "bootstrapped" into a finding that the defendant was the principal offender for purposes of making him eligible for the death penalty under R.C. §2929.04(A)(7).

Petitioner's reliance on Taylor is therefore misplaced, since neither the aggravated murder count, nor the death penalty specification, to which petitioner pleaded guilty required as an element proof that petitioner was the "principal offender." That is, even assuming that petitioner was convicted of the aggravated murder of Mary Jane Stout, not because he was the actual shooter, but because he aided and abetted the actual shooter, such a finding was not "bootstrapped" into a finding of any of the essential elements of the death penalty specification to which he pleaded guilty, *i.e.*, that the offense was committed to avoid detection, apprehension, trial, or punishment for the other offenses of aggravated robbery and attempted aggravated murder.

The circumstances surrounding petitioner's conviction, and that of Clyde Daniel Wesley, do not fall squarely within the holding of *Smith v. Groose*. Since petitioner could have been convicted and sentenced to death as charged, even under the arguments and evidence subsequently presented by the state during Clyde Daniel Wesley's trial, the Court is constrained to find that the state's actions of arguing during and petitioner's hearing that he was the actual shooter, and then at Wesley's trial that Wesley was the actual shooter, did not violate petitioner's rights under the Due Process Clause.

That said, the Court is still troubled by the possibility that the state secured petitioner's death sentence by arguing that petitioner was the actual shooter, and then prosecuted Clyde Daniel Wesley as the actual shooter. As noted above, although the state was not required to prove that petitioner was the actual shooter, and the trial court was not required to find that petitioner was the actual shooter, the fact remains that the state did argue that petitioner was actual shooter and the trial court did find that petitioner was the actual shooter. In fact, the trial court cited its finding that petitioner was the actual shooter as a reason, and a very substantial reason, why the aggravating circumstance outweighed the mitigating factors.

As troubling as this fact is, however, it does not warrant habeas corpus relief because the Supreme Court of Ohio appears to have cured any misplaced reliance on the petitioner's having been the actual shooter. The Supreme Court, which is required to weigh independently the aggravating circumstances against the mitigating factors, considered the testimony of Clyde Daniel Wesley's cellmate -- testimony the petitioner complained was unavailable when the trial court made its sentencing decision -- and found that the testimony was insufficient to tip the scales against imposition of death. In its discussion of the existence and weight any of the mitigating factors set forth in R.C.

§2929.04(B), the Supreme Court stated, "we find that the testimony of a cellmate during Clyde Daniel Wesley's trial is of minimal credibility, especially in light of [Stumpf]'s guilty plea and the substantial evidence to the contrary adduced during [Stumpf]'s sentencing hearing." *Stumpf, supra*, 32 Ohio St. 3d at 106. Thus, even assuming that the state's argument and trial court's finding that petitioner was the principal offender provided a basis for the trial court's determination that the aggravating circumstance outweighed the mitigating factors, the Supreme Court of Ohio cured any potential flaw by independently determining that the aggravating circumstance outweighed the mitigating factors, even in light of the testimony by Wesley's cellmate.

For the foregoing reasons, the Court finds that petitioner's seventh claim for relief is without merit

* * *

Conclusion

In an earlier Opinion and Order, this Court found that claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, 3, and 5.a were barred by procedural default. For the foregoing reasons, the Court finds that petitioner's remaining claims are without merit. Accordingly, all of petitioner's claims are DENIED and this action is hereby DISMISSED. Petitioner is DIRECTED to file with this Court, in accordance with his supplemental brief filed on October 2, 2000, (doc.no. 24, at 2 n.2), and within thirty days from the date of this order, the transcript from Clyde Daniel Wesley's trial. To the extent that petitioner has moved to file a supplemental brief on the merits of petitioner's claims, (doc.no. 24, at 1 fn.1), that motion is DENIED as moot.

/s/GEORGE C. SMITH
United States District Judge

Date: 2/6/01

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DAVID STUMPF,

Petitioner,

v.

Case No. C-1-96-668
JUDGE SMITH
Magistrate Judge Kemp

CARL ANDERSON, Warden,

Respondent.

OPINION AND ORDER

Final judgment dismissing petitioner's death penalty habeas corpus action was entered by this Court on February 7, 2001. This matter is before the Court upon petitioner's motion, pursuant to Fed. R. Civ. P. 59(e), to alter or amend the judgment. Also before the Court is respondent's memorandum in opposition.

Rule 59(e) of the Federal Rules of Civil Procedure, allows parties, within ten days of the date of a judgment, to request the Court to alter or amend that judgment. Rule 59(e) relief is available to correct a clear error of law, to give effect to an intervening change in controlling law or newly discovered evidence, or to prevent a manifest miscarriage of justice. *Gencorp, Inc v. American International Underwriters,* 178 F.3d 804, 834 (6th Cir. 1999), *rehearing and suggestion for rehearing en banc denied* (Jul. 26, 1999). A motion to alter or amend judgment pursuant to Rule 59(e) is not an opportunity to re-argue the same facts, law, or evidence. Thus, a Rule 59(e) motion should not be used to present arguments

that could, and should, have been raised during the litigation. *Sault Ste. Marie Tribe of Chippewa Indians* v. *Engler,* 146 F.3d 367, 374 (6th Cir. 1998). "Where the movant is attempting to obtain a complete reversal of the court's judgment by offering essentially the same arguments presented on the original motion, the proper vehicle for relief is an appeal. (citation omitted)." *Keweenaw Bay Indian Community v. Michigan.* 152 F.R.D. 562. 563 (W.D. Michigan 1992). *aff'd,* 11 F.3d 1341 (6th Cir. 1992).

Petitioner asserts that the Court's *Opinion and Order* contained clear errors of law with respect to his fourth and seventh claims for relief. Petitioner argued in his fourth claim for relief that his attorneys were constitutionally ineffective during the penalty phase of his case.'[1] In his seventh claim for

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[1] There were seven sub-parts to petitioner's fourth claim:

4.1 That counsel agreed to a mental examination which was not conducted in accordance with the provisions of Ohio law;

4.2 That counsel did not retain an independent psychological expert to assist during the penalty phase;

4.3 That counsel did not spend enough time preparing for the mitigation hearing;

4.4 That counsel did not select the most appropriate witnesses to testify and did not properly prepare other witnesses for their testimony;

4.5 That counsel failed to authenticate mitigation questionnaires which were distributed in Stumpf's home community, thus precluding the court from giving substantial weight to them:

4.6 That counsel did not prepare Stumpf adequately to give his unsworn statement, allowing him to focus on denying his involvement in the shooting of Mary Jane Stout rather than on factors relating to mitigation; and

relief, petitioner asserted that the trial court improperly denied his motion to vacate his sentence or, in the alternative, to withdraw his guilty plea based on new evidence. The new evidence offered by petitioner, which evidence had not been previously available to him, was testimony presented by the state during Clyde Daniel Wesley's subsequent trial claiming that it was Wesley, and not petitioner, who had shot and killed Mary Jane Stout. Respondent argues that petitioner has failed to demonstrate newly available evidence, a change in the law, or a clear error in this Court's *Opinion and Order* that would warrant Rule 59 relief.

Claim Four

Petitioner argues that he is entitled to Rule 59(e) relief as to his fourth claim for relief because this Court erred, under the legal standards set forth in *Strickland* v. *Washington,* 466 U.S. 668 (1984), and *Terry Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495 (2000), in rejecting petitioner's claim of trial counsel ineffectiveness during the penalty phase. Petitioner argues that, because of a mistaken belief that petitioner would be spared the death penalty if he pleaded guilty to aggravated murder and only one death penalty specification, defense counsel failed to properly prepare and present available mitigation evidence during the sentencing phase of the trial. The mistaken belief that caused defense counsel to begin mitigation preparation only two weeks before the penalty hearing, to fail to consult a psychologist, and to fail to call as witnesses numerous family members and friends who were present and available during the penalty hearing, was a 'tactic," according to petitioner, that fell outside the wide

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4.7 That counsel did not object to the Court's receipt of the presentence investigation report, the victim impact statements, or the prosecutor's comments upon the unsworn nature of Stumpf's statement.

range of prevailing norms for capital defense attorneys. The result of counsel's deficient performance, petitioner contends, was a breakdown in the adversarial process sufficient to undermine confidence in the reliability of his sentence.

Petitioner has not demonstrated a clear mistake of law or fact, or the need to correct a manifest miscarriage of justice that would warrant Rule 59 relief as to his fourth claim. Petitioner has cited several cases that, although not cited by the Court in its *Opinion and Order,* offer holdings with which this Court's reasoning and findings are not inconsistent. The two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984),[2] governs claims of ineffective assistance of counsel and, this Court adhered to the *Strickland* test in considering every aspect of petitioner's fourth claim for relief. Petitioner also lays out factors and arguments that this Court *did* consider, and then simply urges the Court to change its mind.

In summarizing the standard of review for penalty phase ineffectiveness claims, petitioner cites not only *Strickland,* but also relies heavily on the Supreme Court's recent decision of *Williams v. Taylor,* 529 U.S. 352 (2000). There, the Supreme Court held that the petitioner was entitled to relief on his

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[2] The *Strickland* Court held:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

claim of trial counsel ineffectiveness during the penalty phase of his capital trial and that the State supreme court, in finding otherwise, "rendered a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law. (internal quotation marks omitted)." *Williams,* 529 U.S. at 398-99. In so holding, the Supreme Court noted that counsel did not begin the mitigation preparation until a week before the penalty hearing and that, counsel failed to uncover and present records detailing the petitioner's horrid childhood, borderline mental retardation, assistance provided by petitioner to prison authorities, and testimony touting petitioner's amenability to structured prison life. *Williams,* 529 U.S. at 395-96. Nothing within the *Williams* decision diminishes or otherwise alters the applicability of *Strickland* and, petitioner does not appear to suggest otherwise. Instead, the sole basis of petitioner's extensive reliance on *Williams* appears to center on petitioner's assertion that, "[t]he conduct of defense counsel in the Petitioner's trial is every bit as egregious as that in Terry Williams." (Petitioner's Motion, doc.no. 29, at 9).

Petitioner also relies to a lesser extent on the Sixth Circuit's decision in *Glenn v. Tate,* 71 F.3d 1204 (6th Cir. 1995), *cert. denied,* 519 U.S. 910 (1996). In that case, the Sixth Circuit held that the petitioner was denied effective assistance of counsel during the penalty phase of his capital trial. The Court pointed to the lack of time spent by counsel preparing for the mitigation hearing, counsel's failure to investigate and present readily available information regarding the petitioner's history, character, background, and organic brain damage, and counsel's failure to object, due to their lack of preparedness, to devastating testimony that petitioner's offense was *not* the product of psychosis, mental retardation, organic brain disease, or other mental illness. *Id.* at 1207-1209. Post-sentencing hearings revealed that petitioner had been classified in school as mentally retarded, and that he suffered from global brain damage which, in the

opinion of one neuropsychologist, prevented the petitioner from having the substantial capacity to conform his conduct to the requirements of the law, *Id.* at 1207-1208.

Finally, petitioner cites the decision in *Morales v. Coyle,* 98 F.Supp.2d 849 (ND. Ohio 2000). In that case, the Court originally entered judgment denying the petitioner's habeas corpus claims. The Supreme Court's decision in *Williams v. Taylor, supra,* then issued, prompting Petitioner Morales to file a motion seeking Rule 59 relief. The Court granted the petitioner's motion as to his claim of the denial of effective assistance of counsel during the penalty phase of the petitioner's capital trial, finding that the penalty phase errors alleged by Petitioner Morales were "strikingly similar" to those that formed the basis for relief in *Williams. Morales*, 98 F.Supp.2d at 894.[3]

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[3] The Court wrote:

The Petitioner has succinctly set forth the areas in which his trial counsel were deficient in failing to investigate and prepare available mitigation evidence in his Motion to Alter or Amend. They are as follows:

—Trial counsel did not interview any members of the Petitioner's family.

—Trial counsel did not interview any of the Petitioner's friends or anyone else who knew him.

—Trial counsel did not search any records pertaining to the Petitioner's education, health, mental problems, or juvenile offenses.

—Trial counsel failed to seek the assistance of an expert to prepare a mitigation strategy.

—Trial counsel failed to adequately prepare the Petitioner to make an unsworn statement in the penalty phase of the trial.

—Trial counsel failed to adequately investigate the Petitioner's cultural background and the effect it had on the Petitioners life.

In *Cone v. Bell*, -- F.3d --, 2001 WL 276998 (6th Cir. Mar. 22, 2001), the Court of Appeals for the Sixth Circuit recently granted habeas corpus relief due to the failure of the petitioner's trial counsel to provide effective assistance during the sentencing phase of the petitioner's trial. There, defense counsel not only failed to present any mitigation evidence during the sentencing phase, but also declined to make any argument during the sentencing phase. Rejecting the various explanations offered by defense counsel, the Sixth Circuit concluded that, "[t]his was not 'strategic' representation; it was nonrepresentation of the most deadly sort." *Id.* at * 17.

Even according petitioner every possible benefit of the doubt, the Court is not persuaded that counsel's performance in connection with the penalty phase of petitioner's trial remotely approached the deficiencies and nonfeasance that characterized the penalty phase performances described in *Williams, Glenn, Morales,* or *Cone.* Petitioner's trial attorneys fashioned a mitigation theory based on emphasizing residual doubt and exposing petitioner as a trusting, misguided follower in the criminal offenses; conducted mitigation investigation; utilized social workers to collect background information and interview family, friends, teachers, employers, and acquaintances; and presented evidence and argument to support their mitigation strategy. The

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—Trial counsel failed to investigate the possibility of a neurological cause of the Petitioner's mental and emotional deficiencies due to his lifelong alcohol consumption. Moreover, trial counsel did not request any time between the jury's finding of guilt and the commencement of the penalty phase of the trial to investigate any potential mitigating evidence and to prepare a mitigation strategy. Trial counsel proceeded with the penalty phase the day after the guilty verdict.
Morales, 98 F.Supp.2d at 898-99.

performance of the attorneys in *Williams*, *Glenn*, *Morales*, and *Cone*, in contrast, amounted to virtual nonrepresentation. Thus, petitioner has not demonstrated any clear errors of law in the Court's disposition of his fourth claim for relief that would require Rule 59 relief.

Nor has petitioner demonstrated any clear errors of fact or the need to correct a manifest miscarriage of justice. As the Court noted above, many of the factors presented by petitioner in his motion for Rule 59 relief *were* considered and rejected by this Court. With respect to petitioner's argument that trial counsel erred in failing to obtain a psychologist for the mitigation hearing, the Court noted that the nature of the information gathered by Dr. Eisenberg during his post-sentence evaluation of petitioner has been viewed by the Supreme Court of Ohio as valuable mitigation evidence. The Court also noted that the information could have come in under the "catch-all mitigation factor set forth in §2929.04(B)(7), even if the information was insufficient to qualify under the "mental disease or defect" factor set forth in §2929.04(B)(3). Further, the Court acknowledged that the information gathered by Dr. Eisenberg may have contributed to, or at least would not have been inconsistent with, the primary mitigation theory that defense counsel pursued -- namely, that petitioner was not the actual shooter. As the Court noted above, a Rule 59(e) motion is not an opportunity to re-argue the same facts, law, or evidence. "Where the movant is attempting to obtain a complete reversal of the court's judgment by offering essentially the same arguments presented on the original motion, the proper vehicle for relief is an appeal. (Citation omitted)" *Keweenaw Bay Indian Community v. Michigan,* 152 F.R.D. 562, 563 (W.D. Michigan 1992), *aff'd,* 11 F.3d 1341 (6th Cir. 1992).

Unlike the attorney actions and omissions in *Williams, Glenn*, and *Morales*, the failure by petitioner's attorneys to utilize a psychologist was the product not of unjustifiable

oversight or indolence but of a tactical decision based on the fact that Petitioner Stumpf had exhibited no signs of psychological problems, that the psychological evidence was not consistent with and actually might have diluted their mitigation theory, and on misgivings about unleashing potentially prejudicial information to prosecutors and the three-judge panel. Hindsight revealed that counsel could have gathered relevant and arguably helpful information had they utilized a psychologist. But, as the Court noted in its *Opinion and Order*, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland, supra,* 466 U.S. at 689. Petitioner has failed to demonstrate, and the Court is not otherwise persuaded, that its original decision rejecting this issue requires Rule 59 relief.

With respect to petitioner's renewed argument that defense counsel began their mitigation preparation too late, this Court reiterates that there is no hard and fast rule governing when mitigation preparations should begin. Neither *Williams, Glenn,* nor *Morales* purported to establish or follow such a rule; those cases merely noted inadequate mitigation preparation time as one of many factors that resulted in a deficient performance on the part of defense counsel during the penalty phase. Thus, petitioner's argument that he is entitled to Rule 59 relief on this issue must fail.

As for the investigation and preparation of witnesses, this is not a case such as *Williams, Glenn,* or *Morales,* where defense counsel did next to nothing in the way of collecting character and background information. Petitioner's defense attorneys actually collected quite a bit of information about petitioner's character, childhood, education, employment, and relationships. According to petitioner's argument in support of Rule 59 relief, counsel simply failed to call the right

witnesses or enough witnesses. That argument is insufficient on its face to warrant Rule 59 relief.

Finally, petitioner challenges the Court's decision rejecting his claim that defense counsel were constitutionally ineffective for failing to object to the admission of victim impact evidence. Petitioner argues that Ohio created a statutory bar against the admission of victim impact evidence, thereby creating a liberty interest in preventing the admission of such evidence. Petitioner also appears to dispute this Court's interpretation of *Payne v. Tennessee,* 501 U.S. 808, 826 (1991), where the United States Supreme Court held that the Eighth Amendment erects no *per se* bar if a State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject. The Court concluded that, even assuming the admission of victim impact erroneous, petitioner suffered no prejudice because such evidence was limited, scattered, benign, and, by all indications, went unconsidered by the three-judge panel. That being so, petitioner has failed to point to a clear error of law or fact requiring Rule 59 relief in this regard.

Petitioner's motion to alter or amend the Court's judgment denying his fourth claim for relief must be denied.

Claim Seven

Petitioner argued in his seventh claim for relief that the trial court erred in denying his motion to vacate his sentence or, in the alternative, to withdraw his guilty plea based on new evidence. That new, previously unavailable evidence consisted of testimony presented by the state during the later trial of petitioner's co-defendant, Clyde Daniel Wesley, claiming that it was Wesley, and not petitioner, who had shot and killed Mary Jane Stout. The Court rejected petitioner's seventh claim on the ground that, even assuming the trial court relied on petitioner's being the actual shooter in finding

that the aggravating circumstances outweighed the mitigating factors, the Supreme Court of Ohio effectively negated any possible error by including the testimony from Wesley's trial implicating Wesley as the actual shooter in their independent assessment of the mitigating factors, and still finding that the aggravating circumstances outweighed the mitigating factors sufficient to impose a death sentence. Petitioner argues that this Court erred by accepting as "binding" the Ohio Supreme Court's dismissive assessment of the testimony from Wesley's trial.

Petitioner has demonstrated no clear error of law or mistake of fact that would support Rule 59 relief as to his seventh claim for relief. By way of clarification, this Court did not hold that the State had committed error in arguing that petitioner was the actual shooter who killed Mrs. Stout or that the three-judge panel had committed error in relying on that factor in its sentencing decision. The Court only indicated that it was "troubled" by the possibility that the state might have secured petitioner's death sentence by arguing that he was the actual shooter, while later arguing during Wesley's trial that Wesley was the actual shooter. The Court went on to recognize that, even assuming the three-judge panel had relied on petitioner's being the actual shooter and, even assuming such reliance was erroneous or otherwise problematic, the Supreme Court of Ohio effectively cured any potential error or problem when it considered the testimony from Wesley's trial implicating Wesley as the actual shooter in conducting its own, independent assessment and weighing of the aggravating circumstances and mitigating factors. Petitioner argues that this was error; but, petitioner offers no authority supporting his argument. Thus, petitioner has failed to demonstrate a clear error of law justifying Rule 59 relief.

Petitioner likewise fails to demonstrate any mistake of fact that would warrant Rule 59 relief. That is, petitioner points out factors that this Court already considered but

disagrees with the decision this Court made. Petitioner takes issue with the minimal weight placed by the Supreme Court of Ohio on the testimony by Wesley's cellmate implicating Wesley as the actual shooter, in light of the fact that the state had thrown its weight behind that testimony, thereby lending more credibility than testimony by a jailhouse snitch would normally enjoy. The Court did not fail to consider this argument. Petitioner also expresses disbelief that his three-judge panel would have found a death sentence appropriate, if it had had the benefit of testimony implicating Wesley as the actual shooter -- testimony presented by the State. In making these arguments, petitioner presents no new facts and demonstrates no clear error of law. Petitioner merely disagrees with the decision this Court made. That sort of argument is better suited for appeal. *See Keweenaw Bay Indian Community, supra,* 152 F.R.D. at 563.

Conclusion

For the foregoing reasons, petitioner's motion pursuant to Rule 59(e) to alter or amend the judgment issued by this Court on February 7, 2001 is DENIED.

/s/GEORGE C. SMITH
United States District Judge

Date: May 1, 2001

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DAVID STUMPF,

Petitioner,

v.

Case No. C-1-96-668
JUDGE SMITH
Magistrate Judge Kemp

CARL ANDERSON, Warden,

Respondent.

OPINION AND ORDER

Final judgment dismissing petitioner's death penalty habeas corpus action was entered by this Court on February 7, 2001. A decision denying petitioner's motion to alter or amend that judgment was entered on May 1, 2001. This matter is before the Court on petitioner's notice of appeal, which this Court construes as a motion for a certificate of appealability,'[1] and motion to proceed *in forma pauperis.*

Petitioner raised nine claims for relief and many of those claims contained sub-parts. The Court issued an *Opinion and*

[1] Although this habeas corpus action was filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, ("AEDPA"), and was therefore governed by pre-AEDPA habeas corpus law, the appeal of this case is governed by the AEDPA's certificate of appealability requirements. *Slack v. McDaniel*, 529 U.S. 473, 476 (2000); *Mackey v. Dutton*, 217 F.3d 399, 406-407 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 804 (2001).

Order on November 9, 1999 finding that claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, 3, and 5.a were barred by procedural default. The Court's February 7, 2001 *Opinion and Order* denied the remainder of petitioner's claims on the merits.

I. Legal Standard for Certificate of Appealability

Petitioner seeks to appeal the denial of his habeas corpus petition and; to that end, filed a notice of appeal. This Court construes that notice as a motion for a certificate of appealability. Petitioner also seeks an order permitting him to proceed *in forma pauperis.* Requests for a certificate of appealability and requests to proceed *in forma pauperis* require a district court to make two separate determinations. *See Harkins v. Roberts, et al.*, 935 F.Supp. 871, 874 n.3 (S.D. Mississippi 1996). An appeal from the denial of a habeas corpus action may not proceed unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. §2253(c)(l). To warrant a certificate of appealability, a petitioner must make a substantial showing that he was denied a constitutional right. 28 U.S.C. §2253(c)(2); *see also Barefoot v. Estelle*, 463 U.S. 880 (1983); *Lyons v. Ohio Adult Parole Authority, et al.*, 105 F.3d 1063 (6th Cir.), *cert. denied*, 520 U.S. 1224 (1997). He need not demonstrate that he will prevail on the merits; he needs only to demonstrate that the issues he seeks to appeal are deserving of further proceedings or are reasonably debatable among jurists of reason. *Barefoot*, 463 U.S. at 893 n.4. "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy 28 U.S.C. §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. at 484. The Court will turn first to those claims that were procedurally defaulted, to determine whether any of those default rulings warrant a certificate of appealability. The Court will then consider

whether *any* of the claims it denied on the merits satisfy the standard to be certified lot appeal.

II. Procedural Default Rulings

As noted above, the Court issued an *Opinion and Order* on November 9, 1999 finding that claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, 3, and 5.a were barred by procedural default. Those claims were:

1.2 It is improper to require proof of aggravating circumstances at the guilty phase of a capital trial;

1.4 The statutory scheme punishes those defendants who choose to go to trial;

1.6 The statute permits the pre-sentence investigation report to go to the sentencer with inadmissible information;

1.10 The statute does not permit the sentencer to use sympathy or mercy in determining punishment;

1.12 The statute does not permit the sentencer to choose life in prison over death when no mitigating factors have been proved;

1.14 The Ohio Court of Appeals is unable to compare similar cases where death sentences either are or are not imposed because no data on similar cases is maintained;

3. Stumpf's jury waiver was not knowing, voluntary, and intelligent.

5.a. The trial court erred in deciding Stumpf's motion for a new trial without him being personally

present and based on a record that was not correctly developed as to the involuntary nature of his guilty plea.

The Court concluded that six of these claims, *i.e.*, claims 1.2, 1.4, 1.6, 1.10, 1.12, and 1.14, were record claims and were procedurally defaulted because they were not raised on direct appeal to either the Ohio Court of Appeals or the Supreme Court of Ohio. The Court further found that petitioner had not offered any cause sufficient to excuse the default. Because the default ruling did not turn on novel issues of law or intricate questions of fact that reasonable jurists would find debatable, the Court concludes that no certificate of appealability is warranted on its default ruling as to claims 1.2, 1.4, 1.6, 1.10, 1.12, and 1.14.

The Court also concluded that petitioner's third claim for relief, *i.e.*, that his jury trial waiver was not knowing, intelligent, and voluntary, was barred by procedural default because petitioner had not properly presented it to the state courts. Specifically, the Court found that petitioner presented this allegation to the state courts only as an ineffective assistance of counsel claim, and never argued directly, either on direct appeal or during his postconviction proceedings, that his jury trial waiver was involuntary, unknowing, and unintelligent. The Court also found that petitioner failed to offer cause sufficient to excuse the default. The Court is not persuaded that reasonable jurists would regard as debatable the procedural default ruling as to claim three. Accordingly, no certificate of appealability is warranted.

Finally, the Court concluded that petitioner's second claim five, which this Court designated as claim 5.a., was procedurally defaulted. In that claim, petitioner asserted that it was error for the trial court to deny his motion for a new trial without his personal presence during the proceedings, and that his attorneys were ineffective for failing to develop

the record fully as to the involuntary nature of his guilty plea. The Court concluded that these allegations were procedurally defaulted because the only argument that petitioner raised on direct appeal regarding the denial of his motion for a new trial was that, on the merits, the motion should have been granted because the State of Ohio, after obtaining a death sentence in petitioner's case by asserting that petitioner was the principal offender, presented evidence in the co-defendant's trial that the co-defendant, rather than Petitioner Stumpf, was the principal offender; and that the trial court lacked jurisdiction to render its ruling on his motion for a new trial because the ruling was made by two judges instead of three, since one of the three original judges had died prior to the hearing. The assertions contained in claim 5.a were not properly presented to the state courts, either on direct appeal where they involved matters on the record, or during postconviction proceedings where they involved trial counsel ineffectiveness assertions. Those procedural defaults are straightforward and unquestionable. The Court is not persuaded, therefore, that its procedural default ruling as to claim 5.a. satisfies the standard to warrant a certificate of appealability.

The Court will turn now to the merits of those claims that were properly preserved for habeas corpus review.

III. Merits

A. Ground One -- Constitutionality of Ohio's Death Penalty

In his first claim for relief, petitioner raised nearly twenty arguments challenging the constitutionality of Ohio's death penalty scheme. As discussed in more detail above, the Court concluded that claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14 were barred by procedural default. With respect to the remainder of petitioner's first claim, although some of petitioner's arguments admittedly are more substantial than others, the

Court is satisfied that petitioner's first claim for relief, is deserving of further proceedings under the standard for a certificate of appealability set forth in 28 U.S.C. §2253(c)(2) -- but only those allegations that were properly presented to the state courts and addressed by this Court on the merits.

1.1 Ohio's application of the death penalty is arbitrary and discriminatory;

1.3 The "felony murder" aggravating circumstance found in O.R.C. §2929.04(A)(7) is duplicative of the general definition of aggravated murder and does not serve to distinguish capital murders from other murders;

1.5 The statute permits the death penalty to be imposed upon one who neither possessed the specific desire to kill nor committed the murder with premeditation;

1.7 The statute does not require the State to prove the absence of mitigating circumstances;

1.8 The statute does not specify the method by which the aggravating factors and the mitigating factors are compared to each other;

1.9 The statute puts the burden on the defendant to prove mitigating factors by a preponderance of the evidence;

1.11 The proportionality review required by the statute cannot be accomplished because the State of Ohio does not maintain proper data concerning proportionality;

1.13 The sentencing judge or jury are not given any means by which to decide if death is the only appropriate penalty in the case;

1.15 The proportionality review conducted by the Ohio Appellate Courts is flawed because only cases in which a death sentence has been imposed are compared to each other;

1.16 The Appellate Courts' reweighing of the aggravating and mitigating circumstances is too cursory to be meaningful;

1.17 The death penalty is cruel and unusual punishment *per se*; and

1.18 Under the particular circumstances of Stumpf's case; the State has not demonstrated a compelling state interest in execution or that execution is the least restrictive means available to deter Stumpf from committing similar crimes.

The common thread running through petitioner's attacks on the constitutionality of Ohio's death penalty statute is the risk that Ohio's statutes, either as written or as applied, could result in the arbitrary or capricious infliction of the death penalty because of the failure of those statutes to genuinely, impartially narrow the class of offenders deserving of the death penalty. These issues are reasonably debatable among jurists of reason and, require heightened, perpetual scrutiny. Moreover, although the Sixth Circuit has addressed some of these arguments, it does not appear that the Sixth Circuit has squarely addressed every argument raised by petitioner. Accordingly, after careful consideration and being duly advised, the Court certifies for appeal the parts of petitioner's first claim enumerated above:

1. Do the statutory provisions governing Ohio's capital punishment scheme violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution on their face or as applied to petitioner?

B. Ground Two -- Stumpf's Plea was not Knowing, Voluntary, and Intelligent

Petitioner challenges the propriety of his guilty plea, essentially asserting that he derived no benefit from pleading guilty to capital murder, that he never specifically affirmed his guilt during the plea colloquy, that he did not understand that he could still get the death sentence, and that his attorneys were ineffective for failing to advise him that he was not benefitting from the plea bargain and that he could still receive the death penalty. After careful consideration, the Court rejected petitioner's arguments because the record surrounding the acceptance of petitioner's plea was straightforward, reflected regularity, and revealed an acknowledgment and understanding by petitioner of the plea agreement, of the possibility that he could be sentenced to death by electrocution, and of his guilt -- albeit, qualified by a statement from his lawyers that he expected to be given an opportunity to present evidence relevant to his conduct. Petitioner's attorneys affirmed that they had investigated possible defenses, that they acquiesced in the plea agreement described by the prosecutor, and that they had discussed with petitioner the benefits and consequences of the the plea agreement. In any event, the Court is aware that, with the exception of a qualified admission on the record that he was actually guilty, petitioner has steadfastly maintained that it was his codefendant, and not petitioner himself, who fired the shots that killed the decedent. Further, the court is inclined to proceed with caution when faced with a defendant who pleads guilty to an indictment containing specifications that make him eligible for the death penalty. The Court is satisfied that reasonable jurists could debate whether petitioner's guilty

plea was knowing, intelligent, and voluntary. The Court accordingly certifies the following issue for appeal:

2. Was Petitioner Stumpf's guilty plea knowing, intelligent, and voluntary?

C. Ground Four -- Ineffective Assistance of Trial Counsel

Petitioner argued in his fourth claim for relief that his attorneys were constitutionally ineffective during the penalty phase of the case; he raised seven specific allegations:

4.1 Counsel agreed to a mental examination which was not conducted in accordance with the provisions of Ohio law;

4.2 Counsel did not retain an independent psychological expert to assist during the penalty phase;

4.3 Counsel did not spend enough time preparing for the mitigation hearing;

4.4 Counsel did not select the most appropriate witnesses to testify and did not properly prepare other witnesses for their testimony;

4.5 Counsel failed to authenticate mitigation questionnaires which were distributed in Stumpf's home community, thus precluding the court from giving substantial weight to them;

4.6 Counsel did not prepare Stumpf adequately to give his unsworn statement, allowing him to focus on denying his involvement in the shooting of Mary Jane Stout rather than on factors relating to mitigation; and

4.7 Counsel did not object to the Court's receipt of the presentence investigation report, the victim impact statements, or the prosecutor's comments upon the unsworn nature of Stumpf's statement.

The importance of effective representation by counsel during the mitigation phase of a capital trial cannot be understated. *Terry Williams v. Taylor,* 529 U.S. 362 (2000); *see also Mapes v. Coyle,* 171 F.3d 408,426 (6th Cir.), *cert. denied*, 528 U.S. 946 (1999); *Glenn v. Tate*, 71 F.3d 1204 (6th Cir.), *cert. denied,* 519 U.S. 910 (1996). That is especially true when, as in this case, the petitioner pleads guilty to death-eligible murder and has only the mitigation phase of his case standing between him and a death sentence. Although some of petitioner's counsel ineffectiveness allegations are more substantial than others, the majority of his allegations are legitimate accusations that have garnered substantial consideration by federal courts and have, in some cases, resulted in the reversal or setting aside of death sentences. The Court of Appeals for the Sixth Circuit, as well as numerous district courts within the sixth circuit, have paid particular attention to the adequacy of defense counsel performance during the penalty phase of a capital trial. *See, e.g., Scott v. Mitchell,* 209 F.3d 854, 879-881 (6th Cir.), *cert. denied,* 121 S.Ct. 588 (2000); *Austin v. Bell,* 126 F.3d 843,848-49 (6th Cir. 1997)(granting relief on claim of ineffective assistance of trial counsel during penalty phase), *cert. denied*, 523 U.S. 1079, *cert. denied*, 523 U.S. 1088 (1998); *Glenn v. Tate, supra*; *Mapes v. Coyle*, *supra*; *Jamison v. Collins*, 100 F.Supp.2d 647, 732 (S.D. Ohio 2000)(finding deficient performance by defense counsel, but no prejudice, during penalty phase); *Morales v. Coyle*, 98 F.Supp.2d 849, 894 (N.D. Ohio 2000)(granting relief on claim of ineffective assistance of counsel during penalty phase); *Mason* v. *Mitchell,* 95 F.Supp.2d 744, 785 (N.D. Ohio 2000). What is clear from these cases is that claims of counsel ineffectiveness

during the penalty phase of a capital trial require careful attention. Further, given the fact-intensive nature of those inquiries, such claims defy hard and fast rules that can be applied with ease in subsequent cases and instead, require case-by-case review. For these reasons, the Court is satisfied that petitioner's claims could be reasonably debated by jurists of reason sufficient to satisfy the standard set forth in §2253(c). Accordingly, the Court certifies for appeal petitioner's fourth claim for relief in its entirety:

3. Were Petitioner Stumpf's attorneys constitutionally ineffective during the penalty phase of his capital trial?

D. Ground Five -- Ineffective Assistance of Appellate Counsel

Petitioner argued in his fifth claim for relief that his appellate attorneys provided constitutionally ineffective assistance. Petitioner argued specifically that appellate counsel failed to assign as errors the trial court's failure to file findings of fact and conclusions of law in connection with its rejection of petitioner's motion to suppress statements; the trial court's error in finding a sufficient factual basis for petitioner's guilty plea since there was insufficient evidence demonstrating that petitioner possessed specific intent to kill Mrs. Stout; the trial court's abuse of discretion in failing to grant petitioner's request for a change of venue; the trial court's abuse of discretion in accepting petitioner's guilty plea without explaining the nature of the charge as required by state rules of criminal procedure and constitutional law; the prosecution's improper comments regarding the unsworn nature of petitioner's statement in mitigation; and trial counsel's failure to develop a full record on the involuntary nature of petitioner's guilty plea. Petitioner also assailed appellate counsel for failing to ensure that the presentence investigation report was made a part of the record on appeal.

With two exceptions, the Court is persuaded that petitioner's fifth claim for relief satisfies the §2253(c) standard for a certificate of appealability. Initially, it bears reminding that petitioner entered a guilty plea and that, generally, a guilty plea results in waiver of the right to appeal non-jurisdictional defects. *See, e.g., Tollett v. Henderson,* 411 U.S. 258, 267 (1973); *Ross v. Court,* 30 Ohio St. 2d 323 (1972). In Ohio, however, a guilty plea to capital murder triggers a hearing to ensure that there is a factual basis for, the plea and does not preclude the defendant from attacking the sufficiency of the evidence on appeal. *See State v. Taylor,* 30 Ohio App. 2d 252,261 (Ohio App. 8 Dist. 1972). Two of the issues that appellate counsel unreasonably failed to raise, according to petitioner, were almost certainly waived due to his guilty plea, *i.e.*, the trial court's failure to issue findings of fact and conclusions of law in connection with petitioner's motion to suppress statements and the trial court's denial of petitioner's request to change venue. For that reason, the Court cannot find that reasonable jurists could find debatable appellate counsel's failure to assert those issues on direct appeal. The remainder of appellate counsel ineffectiveness issues asserted by petitioner in his fifth claim for relief warrant appeal wider §2253(c). Criminal defendants are entitled to effective assistance of counsel on the first appeal as of right, *Evitts v. Lucey,* 469 U.S. 387 (1985), and, although the narrowing of issues generally is regarded as the hallmark of effective appellate advocacy, *Smith v. Murray, 477* U.S. 527, 536 (1986); *Jones* v. *Barnes,* 463 U.S. 745, 754 (1983), at least one court within this district has remarked that the "winnowing" or "narrowing" of issues should be undertaken cautiously when the defendant's life is at stake. *Jamison v. Collins,* 100 F.Supp.2d at 740-41 (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). In light of the seriousness with which the Sixth Circuit regards claims of appellate counsel ineffectiveness, *see Mapes v. Coyle*, *supra*, 171 F.3d at 427-29, the Court is satisfied that reasonable jurists could find

debatable petitioner's allegations of appellate counsel ineffectiveness. With the exception of the two issues that were waived by petitioner's guilty plea, *i.e.*, the trial court's failure to issue findings of fact and conclusions of law in connection with petitioner's motion to suppress statements and the trial court's denial of petitioner's request to change venue, the Court certifies petitioner's fifth claim for relief for appeal:

4. Did petitioner's appellate attorneys provide constitutionally ineffective assistance?

E. Ground Six -- Trial Court's Evaluation of Aggravating and Mitigating Factors

Petitioner argued in his sixth claim for relief that the trial court committed error by considering as aggravating factors matters which are not statutorily designated as aggravating factors and by not giving proper weight to the mitigation evidence that petitioner presented. The Court rejected petitioner's allegations, concluding that the non-statutory factors complained of were listed by the trial court, not as additional aggravating factors, but as reasons why the aggravating factor outweighed beyond a reasonable doubt the mitigating circumstances. The Court also pointed out that the integrity of the weighing process was bolstered by the fact that both the Ohio Court of Appeals and the Supreme Court of Ohio conducted their own independent weighing of the aggravating factor and mitigating circumstances and neither appears to have considered anything improper. It is clear that the trial court, appellate court, and Ohio Supreme Court each concluded that only one statutory aggravating factor existed, *i.e.*, that petitioner had killed Mrs. Stout for the purpose of escaping detection, apprehension, trial, or punishment for the other offenses of aggravated robbery and attempted aggravated murder. Under the standard set forth in §2253(c), the Court cannot certify this issue for appeal. Although the process of balancing aggravating factor(s) against mitigating

circumstance(s) for purposes of determining whether to sentence a defendant to death is fact-intensive, petitioner's specific allegations simply are not debatable. Construing every possible doubt *in* petitioner's favor, reasonable jurists could not find either that the trial court or reviewing courts considered non-statutory aggravating factors, or that the trial court or reviewing courts failed or refused to give weight to mitigating circumstances.

F. Ground Seven -- Trial Court's Denial of Motion to Vacate Sentence or Withdraw Plea

Petitioner argued in his seventh claim for relief that the trial court committed error in denying his motion to vacate his sentence or withdraw his plea on the basis of newly discovered evidence. That newly discovered evidence was testimony presented by the State at the subsequent trial of petitioner's co-defendant, Clyde Daniel Wesley, that it was Wesley, not petitioner, who had shot and killed the decedent. The State had taken the exact opposite position during petitioner's case. In *Smith v. Groose*, 205 F.3d 1045 (8th Cir.), *cert. denied*, *Gammon v. Smith*, 121 S.Ct. 441 (2000), the Eighth Circuit held that the state violated the petitioner's due process rights when it presented factually inconsistent and irreconcilable evidence during different trials to obtain convictions of two different individuals for the same murders. The Court distinguished petitioner's case from *Smith v. Groose* because, unlike the evidence at issue in *Smith*, the inconsistent evidence at issue in petitioner's case, *i.e.*, whether petitioner or Wesley fired the fatal shots, concerned a fact that the State was not required to argue or prove in order to obtain a conviction for aggravated murder or a sentence of death in either trial; but that certainly could be debated among reasonable jurists. The Court also resolved its concern that the State might have secured petitioner's death sentence by presenting inconsistent evidence by taking note that the Supreme Court of Ohio, it its decision affirming the judgment

against petitioner, rejected the evidence claiming that it was Wesley, not petitioner, who had shot and killed the decedent. That conclusion, too, could be debated among reasonable jurists. The Court accordingly certifies the following issue for appeal:

5. Did the trial court err in denying petitioner's motion to vacate his sentence or withdraw his plea based on newly discovered evidence?

G. Ground Eight -- Trial Court's Denial of Motion with Two Instead of Three Judges

In his eighth claim for relief, petitioner argued that his constitutional rights were violated when his motion to vacate his sentence was denied by only two judges following the intervening death of one of the judges who had comprised petitioner's three-judge panel. Petitioner reasoned that, because O.R.C. §2945.06 requires the bench trial of a capital defendant to be conducted by a three judge panel, "[c]onsideration of post-sentencing proceedings by less than the entire panel is not authorized and violates petitioner's right to due process***." (Petition, doc. no. 2, at ¶80). The Court concluded that petitioner's claim scarcely demonstrated even a state law violation and fell far short of demonstrating arbitrary and capricious imposition of the death penalty. Construing every possible doubt in petitioner's favor, the Court is not persuaded that reasonable jurists could find its decision debatable or wrong.

H. Ground Nine -- Failure of Sentencing Opinion to Comply with State Law

Petitioner argued in his ninth claim for relief that the trial court did not comply with O.R.C. §2929.03(F), which provides that when a three-judge panel imposes a death sentence, the panel must state in a separate opinion specific

findings relating to the existence of any mitigating factors, aggravating circumstances, and the reasons why the aggravating circumstances outweighed the mitigating factors. Petitioner complained that the trial court did not identify adequately the aggravating and mitigating factors or assign them proper weight. The Court concluded that the trial court's sentencing opinion complied with the letter and spirit of R.C. §2929.03(F) by setting forth explicitly the mitigating factors, the aggravating circumstance, and the reasons why the aggravating circumstance outweighed beyond a reasonable doubt the mitigating factors. In other words, the Court found that petitioner failed entirely to demonstrate how the trial court's sentencing opinion deviated at all *from* R.C. §2929.03(F). The Court does not believe that reasonable jurists could find the Court's decision debatable or wrong.

In sum, the Court certifies the foregoing five issues for appeal under the standard set forth in 28 U.S.C. §2253(c)(2).

IV. *In Forma Pauperis*

The inquiry as to whether a petitioner can proceed *in forma pauperis*, however, is not resolved by a determination that the petitioner has satisfied the requirements for a certificate of appealability under 28 U.S.C. §2253(c)(2). Section 1915, Title 28 United States Code governs a district court's *in forma pauperis* determination. The grant of pauper status for purposes of appealing the denial of §2254 relief requires a court to determine both that the applicant is unable to pay the required filing fee and that the appeal is taken in good faith. Thus, when a prisoner seeks to proceed *in forma pauperis* on appeal from the denial of §2254 relief, the district court must determine, in addition to whether the prisoner is able to pay the filing fee, whether the appeal is taken in good faith. As a general rule, an appeal is not taken in good faith if the issue presented is frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). Although this determination will

require an inquiry into the merits of the appeal, it does not require that probable success be demonstrated. Rather, the court's inquiry should be limited to whether the appeal involves "legal points arguable on their merits." *Darden v. McMackin*, 761 F.Supp. 52, 54 (N.D. Ohio W.D. 1991)(citing *Jones v. Frank*, 622 F.Supp. 1119 (W.D. Texas 1985)). The Court is satisfied that petitioner has made both the inability to pay and good faith showings required to proceed *in forma pauperis* on direct appeal under §1915(a), and he may therefore proceed *in forma pauperis* on appeal.

IT IS SO ORDERED.

/s/George C. Smith
United States District Judge

Date: 7/11/01

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John David Stumpf,	:	
Plaintiff,	:	
v.	:	Case No. C-1-96-668
Carl Anderson, Warden,	:	JUDGE SMITH
Defendant.	:	

OPINION AND ORDER

This is a death penalty habeas corpus case filed by petitioner, John David Stumpf, pursuant to 28 U.S.C. §2254. After pleading guilty to capital murder, and after an evidentiary hearing to determine the factual basis for the plea and a mitigation hearing to address sentencing issues, Stumpf was sentenced to death by a three-judge panel on September 24, 1984. After exhausting all available state court remedies, Stumpf filed this habeas corpus petition in the United States District Court for the Northern District of Ohio on November 16, 1995. The case was eventually transferred to this Court and docketed in the Southern District of Ohio on July 5, 1996. A stay of execution has been issued. This order will address the question of whether any of Stumpf's claims for relief must be denied on grounds that they were procedurally defaulted during the course of state court proceedings, and that he has not successfully demonstrated the existence of cause sufficient to excuse that default.

I.

The details of the murder to which Stumpf confessed are set forth in numerous state court opinions, including the Ohio Supreme Court's published opinion in *State v. Stumpf*, 32 Ohio St. 3d 95, 512 N.E.2d 598 (1987) This Opinion and Order will include only a brief summary of those facts, because, for the most part, they are undisputed and do not play a significant part in the federal constitutional issues raised in Stumpf's habeas corpus petition.

On May 14, 1984, Stumpf, Clyde Daniel Wesley, and Norman Leroy Edmonds, after visiting a bar in Washington, Pennsylvania, got on Interstate 70 and headed west toward Ohio. By sundown, they had reached Guernsey County. They stopped their car along I-70 and, leaving Edmonds in the car, Stumpf and Wesley walked to a nearby house under the pretense of needing to make a phone call.

The house they chose was owned and occupied by Norman and Mary Jane Stout. Mr. Stout admitted Stumpf and Wesley into his home and allowed them to use the phone. When they had completed the call, both Stumpf and Wesley produced pistols and announced a robbery. Stumpf held the Stouts at gunpoint in a back bedroom while Wesley searched the house for items to steal.

At some point, Mr. Stout moved toward Stumpf, and Stumpf shot him between the eyes with his pistol. The shot was not fatal, and Stout subsequently pushed Stumpf into the next room. During this altercation, Stout was struck on the head with a pistol and shot in the head a second time. These actions were enough to render him semi-conscious but not to kill him.

While lying on the floor in the other room, Stout heard four gunshots. There is no dispute that Mary Jane Stout was

shot and killed during the course of this robbery, although there is a dispute as to whether Stumpf or Wesley fired the fatal shots. After Mrs. Stout was killed, Stumpf and Wesley stole the Stout's car and fled. Stumpf was arrested several days later, and after initially denying any knowledge about these crimes and then being told that Mr. Stout had survived, he confessed to being involved.

At the time the trial court proceedings occurred, Wesley had not yet been extradited from Texas. However, subsequent to Stumpf's having pleaded guilty and having been sentenced to death, Wesley was convicted of aggravated murder by a jury and received a sentence of life imprisonment without the possibility of parole for 20 years. The State introduced evidence at Wesley's trial that Wesley and not Stumpf fired the shots that killed Mrs. Stout. Edmonds was not charged in the Stout murder and robbery, but was charged for other offenses committed during this crime spree, and he agreed to and did testify against both Stumpf and Wesley concerning the murder of Mary Jane Stout.

II.

This case has followed the typical procedural path through the state court system. After being sentenced to death, Stumpf filed a direct appeal which was pursued through the Fifth District Court of Appeals and to the Ohio Supreme Court, and he also filed a post-conviction petition which, after it was denied, was appealed to both those courts. He did not file a petition for delayed reconsideration in the Court of Appeals, as authorized by *State v. Murnahan*, 63 Ohio St. 3d 60 (1992), because he raised ineffective assistance of appellate counsel claims in his post-conviction petition and, although the trial court declined to consider those claims, the Court of Appeals addressed them on their merits during the course of the appeal from the denial of the post-conviction petition. All of Stumpf's state court appeals were exhausted,

and his last petition for a writ of *certiorari* to the United States Supreme Court was denied, by November 12, 1991. It is unclear why more than four years elapsed before he filed his federal habeas corpus petition. It is helpful, in this opinion, to set forth in some detail the procedural history of this case. This history will be useful not only for analyzing the procedural default issues addressed here, but also in providing a broader context for the analysis on the merits of his claims which will be addressed in a subsequent opinion.

A. Trial and Direct Appeal

Stumpf was indicted by the May, 1984 term of the Guernsey County Grand Jury for the crimes which he allegedly committed on May 14, 1984. The indictment charged him with aggravated murder with certain specifications under O.R.C. §§2929.04 and 2929.71; attempted murder; aggravated robbery; and two counts of theft. The transcripts filed by the parties reflect that trial proceedings began on August 20, 1984 with arguments on pretrial motions, although it appears that a hearing on a motion to suppress, which raised a *Miranda* warning issue, was held on July 31, 1994. After additional testimony on the motion to suppress was heard, the trial court overruled it, and jury selection began. Jury selection continued through August 21 and 22, 1984, and ended on August 23, 1984 when Stumpf waived a jury trial.

The record does not reflect that any colloquy was held in open court concerning the jury waiver. Although the waiver occurred on August 23, 1984, the transcript of proceedings filed with this Court ends in the middle of *voir dire* questioning of a juror. The next volume of the transcript begins on September 17, 1984, before a three-judge panel, and at the beginning of those proceedings Judge Henderson, the presiding Judge, made the following statement:

"By way of explanation, this case was assigned for a jury trial and at the request and at the instance of the defendant with the advice and consent of his attorneys, the defendant did on the 23rd day of August, 1984, file with this Court a waiver as follows: I, John David Stumpf, defendant in the above case, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a three-judge panel in the Court to which the case may be pending. I fully understand that under the laws of this State, I have a Constitutional right to a trial by jury."

(Tr., 9/17/84, at 4-5).

Immediately after reading that statement into the record, the Court was advised by the prosecuting attorney that a plea agreement had been reached. The terms of that agreement, as set forth in the record, are essentially the following.

The two most serious counts of the indictment returned against Stumpf were Counts One and Two. Count One, the capital murder count, accused Stumpf of killing Mary Jane Stout during the commission or the attempted commission of a felony. There were four specifications to that count. The first specification alleged that Stumpf committed the murder for purposes of escaping detection, apprehension, trial or punishment for the aggravated robbery offense. The second specification charged that the killing was a part of course of conduct involving an attempt to kill two or more persons, namely Mary Jane Stout and Norman Stout. The third specification repeated the "felony murder" language of Count One, accusing Stumpf of committing the murder in the course of committing an aggravated robbery. It also asserted that Stumpf was the principal offender for the aggravated murder count. Finally, the fourth specification was a firearms specification. Count Two, the attempted murder count involving Norman Stout, also had a firearms specification.

As recited by the prosecutor, the plea agreement would permit the prosecutor to amend the first specification to Count One by alleging that Mary Jane Stout was killed by Stumpf for the purposes of escaping detection, apprehension, trial or punishment not just for one, but for two other offenses which he committed, both aggravated robbery as specified in the indictment and also the attempted aggravated murder of Norman Stout. The second and third specifications to Count One would be dismissed, and Stumpf would plead guilty to Count One with the first and fourth specifications only. As amended, and even with the second and third specifications dismissed, Count One was still a capital murder count which carried the potential for the death penalty. Stumpf also agreed to plead guilty to Count Two, attempted aggravated murder, with the understanding that the firearms specifications on Count One and Two would be merged for sentencing purposes. The remaining counts of the indictment would be dismissed.

After these terms were recited on the record, Stumpf was asked, and he acknowledged, that these were the terms of the plea agreement. (Tr., 9/17/84, at 8-9). The Court then entered into a colloquy both with counsel and with Stumpf concerning the rights which would be waived if he pleaded guilty. Of most significance, Stumpf was asked the following questions and gave the following answers:

> "JUDGE HENDERSON: For the first Count, which is that of aggravated murder, you are subject to the following penalties: you are subject to being - - to a sentence of 20 years without probation that is a sentence of life without probation for 20 years; a sentence of life without probation for a period of 30 years and the death penalty by electrocution could be imposed against you. Do you understand
>
> THE DEFENDANT: Yes, sir."

(Tr. 14). He was asked again, at Tr. 17-18, if he understood that after hearing the evidence relating to the factual basis for a plea and the evidence in mitigation, he could receive "the maximum sentence prescribed by law," and he acknowledged that he understood that. He then denied that any other agreements, promises, or inducements were made to obtain a guilty plea. (Tr. 18).

Judge Henderson then asked Stumpf if he was "in fact guilty of Count One with specification one and specification four?" (Tr. 18). Stumpf did not directly answer that question. Rather, his counsel responded with a statement that he had been asked by Stumpf to explain the answer, that the answer was yes, and that Stumpf would say so conditioned upon his right to present evidence at a later time concerning the nature of his conduct. (Tr. 18). The Judge responded by stating that Stumpf would have the right to present evidence in the mitigation hearing, but he then asked Stumpf again, with that understanding, to respond to the question of whether he was in fact guilty of aggravated murder including the two specifications. Stumpf responded that he was. (Tr. 18-19). He then pleaded guilty to that count. (Tr. 22).

Under applicable law, in a capital murder case, the trial court, even when a guilty plea has been presented, is required to hear evidence to insure itself that the defendant is actually guilty of the offense to which he pleaded. That evidentiary hearing began on September 18, 1984 and lasted for three days.

Various witnesses were called to testify at the evidentiary hearing. The only eyewitness account of what occurred inside the Stout home was provided by Norman Stout. At the time of the hearing, he was still suffering from the after-effects of having been shot twice in the head. Neither Mr. Stout nor any other witness was able to state conclusively

whether Stumpf or Wesley shot Mary Jane Stout. In his opening statement, Stumpf's counsel asserted that Wesley was the shooter, notwithstanding the fact that his client had pleaded guilty to a capital murder charge involving Mary Jane Stout.

Various statements made by Stumpf to law enforcement officers were introduced at the trial. In those statements, he denied shooting Mary Jane Stout, although he admitted shooting Norman Stout with one of the two .25 caliber revolvers which were used in the crime. The closest which the evidence came to identifying the shooter was the testimony of a ballistics expert who opined that all the bullets removed from Mary Jane Stout and the bullet removed from Norman Stout's head had been fired from the same gun. Since Stumpf admitted that he shot Norman Stout, an inference could have been drawn that he also shot Mary Jane Stout.

At the close of the evidence, Stumpf's counsel argued that the state had not presented sufficient evidence to demonstrate factual support for the finding that Stumpf was guilty of specification one, mainly committing the murder in order to avoid apprehension for other offenses. That motion was overruled and the Court found Stumpf guilty of all the offenses to which he had entered a guilty plea. That finding was made on September 20, 1984, and the mitigation hearing began immediately. After the pre-sentence investigation report was introduced at the request of Stumpf's counsel, a number of witnesses testified concerning mitigating factors. The hearing was completed on September 21, 1984. On that date, Stumpf's mother testified, and Stumpf himself gave an unsworn statement. His unsworn statement did not directly address mitigating factors, but rather consisted of his version of the crime, which included a denial that he shot Mary Jane Stout. The State presented one witness at the mitigation hearing, the Guernsey County Probation Officer, who testified concerning Stumpf's criminal history.

On September 24, 1984, the case was reconvened for purposes of sentencing. At the sentencing hearing Stumpf received a 7 to 25 year term on Count Two plus a three-year mandatory consecutive term for the firearms specification. On Count One, Stumpf was sentenced to death based upon the court's finding that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. After a written judgment entry to that effect was filed, Stumpf began the appellate process.

B.

Represented by the same counsel, Stumpf filed his notice of appeal on October 23, 1984. He raised the following assignments of error:

ASSIGNMENT OF ERROR NO. 1
THE TRIAL COURT ERRED IN FINDING THAT THE ONE AGGRAVATING CIRCUMSTANCE OUTWEIGHED THE MITIGATING FACTORS PRESENTED BY THE DEFENDANT. THE PROCEDURE FOLLOWED BY THE COURT WAS CONTRARY TO LAW. THE FINDING WAS CONTRARY TO THE EVIDENCE AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 2
THE DEATH SENTENCE IS DISPROPORTIONATE TO THAT IMPOSED IN SIMILAR CASES, AND THEREFORE VIOLATIVE OF THE STATE AND FEDERAL CONSTITUTIONS.

ASSIGNMENT OF ERROR NO. 3
THE TRIAL COURT ERRED IN REQUIRING EVIDENCE OFFERED IN MITIGATION TO BE PROVED BY A PREPONDERANCE. SUCH A REQUIREMENT DEPRIVED THE DEFENDANT OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW. THE TRIAL COURT ERRED IN ITS JUDGMENT AND SENTENCE BY FAILING TO COMPLY WITH SECTION 2929.03 (F) OF THE OHIO REVISED CODE.

ASSIGNMENT OF ERROR NO. 5
UPON AN INDEPENDENT WEIGHING, IT IS APPARENT THAT THE SINGLE AGGRAVATING CIRCUMSTANCE THE DEFENDANT WAS FOUND GUILTY OF COMMITTING DOES NOT OUTWEIGH THE MITIGATING FACTORS BEYOND A REASONABLE DOUBT, AND THEREFORE, THE DEATH SENTENCE CANNOT BE AFFIRMED, PURSUANT TO REVISED CODE SECTION 2929.05(A).

ASSIGNMENT OF ERROR NO. 6
DEATH IS NOT THE APPROPRIATE SENTENCE IN THIS CASE. THEREFORE, PURSUANT TO REVISED CODE SECTION 2929.05(A), AND REVISED CODE SECTION 2929.06, AND THE STATE AND FEDERAL CONSTITUTIONS, THIS DEATH SENTENCE MUST BE VACATED AND

THE CASE REMANDED FOR A RE-SENTENCING HEARING TO DETERMINE WHICH LIFE TERM WILL BE IMPOSED.

ASSIGNMENT OF ERROR NO. 7
THE DEATH PENALTY IMPOSED UPON THE DEFENDANT, AND THE STATUTES AUTHORIZING IT, IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS TWO, NINE, TEN AND SIXTEEN, ARTICLE I OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. 8
OHIO REVISED CODE, SECTIONS 2929.03 AND 2929.04, AS APPLIED TO THE DEFENDANT, VIOLATE UNITED STATES CONSTITUTION, AMENDMENT VIII AND OHIO CONSTITUTION ARTICLE I, SECTION 9, PROHIBITION AGAINST THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT.

ASSIGNMENT OF ERROR NO. 9
THE DEATH PENALTY IMPOSED UPON THIS DEFENDANT UNDER SECTIONS 2929.02, 2929.022, 2929.03 AND 2929.04 OF THE REVISED CODE OF OHIO VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT PROVISIONS AND DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS BECAUSE THE AGGRAVATING CIRCUMSTANCE SET FORTH IN SECTION 2929.04(A) IS OVERBROAD AND VAGUE.

ASSIGNMENT OF ERROR NO. 10
THE MITIGATING CIRCUMSTANCES IN SECTION 2929.04(3) OF THE REVISED CODE OF OHIO ARE IMPERMISSIBLY VAGUE.

While the direct appeal was pending, Stumpf filed a motion for leave to withdraw his guilty plea. On September 26, 1985, the Court of Appeals remanded the case in order to allow the trial court to consider that motion. In his motion, Stumpf argued that because Clyde Daniel Wesley had, subsequent to Stumpf's guilty plea and sentencing hearings, been found guilty of aggravated murder, and because the State had presented a witness in Wesley's trial who testified that Wesley confessed to having shot Mary Jane Stout, Stumpf should be permitted either to withdraw his guilty plea to that charge or be entitled to reopen the mitigation hearing in order to offer evidence that he was not the principal offender in the crime. On October 7, 1985, the trial court overruled that motion, and Stumpf subsequently filed a timely notice of appeal and raised an additional assignment of error asserting that the trial court erred in denying his motion to set aside his plea or in the alternative to conduct a new sentencing hearing. The Court of Appeals, in a decision filed on May 22, 1986, overruled both the original and supplemental assignments of error and affirmed Stumpf's conviction. One judge of the three-judge panel dissented in part, concluding that the obligation imposed by law to weigh the death sentence imposed on Stumpf against sentences imposed in similar cases required that Stumpf be sentenced no more harshly than Wesley.

Stumpf, still represented by the same counsel who had represented him at trial, appealed the judgment of the Court of Appeals to the Ohio Supreme Court. The assignments of error raised in that court were substantially the same as those presented to the Court of Appeals. In the published opinion referred to earlier, the Ohio Supreme Court also affirmed the

conviction and sentence, and Stumpf's petition for a writ of *certiorari* to the United States Supreme Court was denied on February 22, 1988.

Stumpf filed a post-conviction petition in the Guernsey County Court of Common Pleas on October 11, 1988. He amended his petition on November 18, 1988. In his petition, he raised four separate grounds, as follows:

1. The petitioner was denied the effective assistance of counsel in the guilt determination and mitigation phases of his case as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I §10 and 16 of the Ohio Constitution.

    a. Counsel's ineffective assistance violated the Sixth Amendment and rendered the guilty plea involuntary.

    b. Counsel failed to properly prepare the penalty phase of the trial.

2. The petitioner did not knowingly, intelligently and voluntarily waive his right to a jury trial.

3. Counsel neglected to properly prepare and present the petitioner's motion for a new trial.

4. Counsel denied the petitioner effective assistance of counsel on appeal as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I Sections 10 and 16 of the Ohio Constitution; and *Evitts v. Lucey* (1985), 469 U.S. 387.

Both parties moved for summary judgment in the post-conviction action, and on November 27, 1989, the trial court

overruled the petition, adopting almost verbatim the proposed findings of fact and conclusions of law submitted by the county prosecutor. Stumpf timely appealed the denial of his postconviction petition, and that denial was affirmed by the Fifth District Court of Appeals on July 23, 1990. That decision was subsequently affirmed by the Ohio Supreme Court and a petition for *certiorari* to the United States Supreme Court was denied on November 12, 1991.

C. The Habeas Corpus Petition

Stumpf's habeas corpus petition raises ten separate claims for relief. Two of them are designated as the "fifth claim," explaining why a petition raising ten claims ends with the ninth claim for relief. Many of the claims have subparts. This section of the Opinion and Order will set forth in detail the claims Stumpf has raised in this court.

1. Claim One - Unconstitutionality of the Death Penalty

Stumpf's petition mounts a general attack on the constitutionality of Ohio's death penalty scheme, both on its face and as applied to the particular facts of its case. There appear to be 18 separate claims, and it is important to identify each separately, because a fair number of them appear not to have been raised as part of the state court proceedings. The Court will reproduce the claims in the order which they appear in the habeas corpus petition.

Stumpf's constitutional claims are the following:

1.1 Ohio's application of the death penalty is arbitrary and discriminatory;

1.2 It is improper to require proof of aggravating circumstances at the guilt phase of a capital trial;

1.3 The "felony murder" aggravating circumstance found in O.R.C. §2929.04(A) (7) is duplicative of the general definition of aggravated murder and does not serve to distinguish capital murders from other murders;

1.4 The statutory scheme penalizes those defendants who choose to go to trial;

1.5 The statute permits the death penalty to be imposed upon one who neither possessed the specific desire to kill nor committed murder with premeditation;

1.6 The statute permits the pre-sentence investigation report to go to the sentencer with inadmissible information;

1.7 The statute does not require the State to prove the absence of mitigating circumstances;

1.8 The statute does not specify the method by which the aggravating factors and the mitigating factors are compared to each other;

1.9 The statute puts the burden on the defendant to prove mitigating factors by a preponderance of the evidence;

1.10 The statute does not permit the sentencer to use sympathy or mercy in determining punishment;

1.11 The proportionality review required by the statute cannot be accomplished because the State of Ohio does not maintain proper data concerning proportionality;

1.12 The statute does not permit the sentencer to choose life in prison over death when no mitigating factors have been proved;

1.13 The sentencing judge or jury are not given any means by which to decide if death is the only appropriate penalty in the case;

1.14 The Ohio Court of Appeals is unable to compare similar cases where death sentences either are or are not imposed because no data on similar cases is maintained;

1.15 The proportionality review conducted by the Ohio Appellate Courts is flawed because only cases in which a death sentence has been imposed are compared to each other;

1.16 The Appellate Courts' reweighing of the aggravating and mitigating circumstances is too cursory to be meaningful;

1.17 The death penalty is cruel and unusual punishment per se; and

1.18 Under the particular circumstances of Stumpf's case, the State has not demonstrated a compelling state interest in execution or that execution is the least restrictive means available to deter Stumpf from committing similar crimes.

2. Claim Two - Stumpf's Guilty Plea was not Knowing, Voluntary and Intelligent

Stumpf's second claim attacks the propriety of his guilty plea. Essentially, he asserts that he derived no benefit from pleading guilty to a capital murder charge, that he never specifically affirmed his guilt during the plea colloquy, that he did not understand, when he pleaded guilty, that he could still get the death sentence, and that his counsel was ineffective at this stage for failing to advise him that he was not benefiting

from the plea bargain and that he could still receive the death penalty.

3. Claim Three - Stumpf's Jury Waiver was not Knowing, Voluntary and Intelligent

In his third claim, Stumpf attacks the propriety of his waiver of the right to trial by jury. He claims both that the state court did not make an appropriate inquiry to determine whether he fully understood the right he was waiving, and that his counsel rendered him ineffective assistance at this stage of the case. With respect to this latter portion of the claim, he contends that the decision to waive the jury was motivated by the killing of a police officer in the Guernsey County area during jury selection in his case. He asserts that, rather than deciding that this factor would make it next to impossible to select a fair jury, counsel should have renewed an earlier motion trial.

4. Claim Four - Ineffective Assistance of Trial Counsel

Stumpf claims that his attorneys were constitutionally ineffective at the penalty phase of the case. There are seven subparts to this claim:

4.1 That counsel agreed to a mental examination which was not conducted in accordance with the provisions of Ohio law;

4.2 That counsel did not retain an independent psychological expert to assist during the penalty phase;

4.3 That counsel did not spend enough time preparing for the mitigation hearing;

4.4 That counsel did not select the most appropriate witnesses to testify and did not properly prepare other witnesses for their testimony;

4.5 That counsel failed to authenticate mitigation questionnaires which were distributed in Stumpf's home community, thus precluding the Court from giving substantial weight to them;

4.6 That counsel did not prepare Stumpf adequately to give his unsworn statement, allowing him to focus on denying his involvement in the shooting of Mary Jane Stout rather than on factors relating to mitigation; and

4.7 That counsel did not object to the Court's receipt of the presentence investigation report, the victim impact statements, or the prosecutor's comments upon the unsworn nature of Stumpf's statement.

5. Ineffective Assistance of Appellate Counsel

In the first of the two claims in the petition designated as the "fifth claim," Stumpf asserts that his appellate counsel was also ineffective. This claim has six subparts:

5.1 That counsel did not raise as an issue on appeal the trial court's failure to file findings of fact and conclusions of law relating to his motion to suppress his statements;

5.2 That counsel erred in failing to raise the absence of a factual basis for Stumpf's guilty plea;

5.3 That counsel should have moved for a change of venue;

5.4 That counsel should have attacked the Court's acceptance of the guilty plea without explaining precisely to Stumpf the nature of the charge to which he was pleading guilty;

5.5 That counsel failed to raise the prosecutor's improper comments directed toward Stumpf's unsworn statement; and

5.6 That counsel failed to insure that the presentence investigation report was included in the appellate record.

5a. Claim Five(second) - The *New* Trial Hearing

In the second "fifth claim" in his petition, Stumpf asserts that it was error to decide his motion for a new trial without him being personally present. He also asserts that the record was not correctly developed as to the involuntary nature of his guilty plea. This latter contention appears to be another claim of ineffective assistance of counsel at the trial court level.

6. Claim Six - Trial Court Errors

In his sixth claim, Stumpf asserts that the trial court lost its way when it evaluated the aggravating and mitigating circumstances in his case. Essentially, he asserts that the court considered as aggravating factors matters which are not so designated by Ohio law, and that the court also failed to give appropriate weight to the mitigating evidence which he presented.

7. Claim Seven - Denial of Motion to Vacate Sentence/ Withdraw Guilty Plea

In his seventh claim, Stumpf asserts that the trial court improperly denied his motion to vacate his sentence or, in the

alternative, to withdraw his guilty plea based on new evidence. This relates to the motion filed by Stumpf after the State successfully prosecuted Clyde Daniel Wesley for aggravated murder using evidence that he, and not Stumpf, fired the four shots which killed Mary Jane Stout. Stumpf asserts that, at a minimum, the presentation of this evidence, which was not available to him at the time of his trial, required the Court to vacate the death sentence and consider a lesser penalty.

8. Claim Eight - The Post-Sentencing Hearing

Stumpf was sentenced by a three-judge panel, as required by Ohio law. His post-sentence motion was determined by only two judges, because the third judge from the original panel had died in the interim. He asserts that in his eighth claim that this procedure violated Ohio law because all proceedings in a capital murder case are required to be conducted by a three-judge panel.

9. Claim Nine - Noncompliance with O.R.C. 2929.03(F)

Finally, in his ninth claim, Stumpf asserts that the trial court did not comply with Ohio Revised Code §2929.03(F). That statutory section provides that when a three-judge panel imposes a sentence of death, it is required to state in a separate opinion specific findings relating to the existence of any mitigating factors set forth by statute, any other mitigating factors, the aggravating circumstances in the case, and the reasons why the aggravating circumstances were sufficient to outweigh the mitigating factors. Stumpf

contends that the trial court did not adequately identify aggravating and mitigating factors nor did its opinion assign them the appropriate weight.

III. PROCEDURAL DEFAULT

It does not appear that every claim Stumpf has raised in his habeas corpus petition was presented to the Ohio courts either during the direct appeal or as part of the post-conviction process. In particular, respondent contends that at least seven of the eighteen issues presented under Claim One were the subject of a procedural default, and that Claim Three and the second "fifth claim" were also waived in this manner. This claim of procedural default is evaluated under the following legal standard.

A.

In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between the state and federal courts, a state criminal defendant with federal constitutional claims is required to present those claims to the state courts for consideration. 28 U.S.C. §2254(b), (c). If he fails to do so, but still has an avenue open to him by which he may present his claims, then his petition is subject to dismissal for failure to exhaust state remedies. *Id.*; *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). But if, because of a procedural default, the petitioner can no longer present his claims to the state courts, then he has also waived those claims for purposes of federal habeas corpus review, unless he can demonstrate both cause for the procedural default, as well as actual prejudice from the alleged constitutional error. *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

In the Sixth Circuit, a four-part analysis must be undertaken when the state argues that a federal habeas claim is waived by the petitioner's failure to observe a state procedural rule. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986) "First, the court must decide that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Id.* Second, the Court must determine whether the state courts actually enforced the state procedural sanction. *Id.* Third, it must be decided whether the state procedural forfeiture is an adequate and independent state ground upon which the state can rely to foreclose review of a federal constitutional claim. *Id.* Finally, if the Court has determined that a state procedural rule was not complied with, and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for him not to follow the procedural rule, and that he was actually prejudiced by the alleged constitutional error. *Id.* This "cause and prejudice" analysis applies to failures to raise or preserve issues for review at the appellate level. *Leroy v. Marshall*, 757 F.2d 94 (6th Cir.), cert. *denied*, 474 U.S. 831 (1985).

B.

Respondent claims that at least seven of the grounds presented in petitioner's first claim in support of the argument that the Ohio Death Penalty statute is unconstitutional were never presented to any Ohio court. Because each of these claims would be apparent from the face of the record, petitioner was required to present them in his direct appeal. The Court has carefully reviewed the record of the direct appeal, both to the Court of Appeals of Guernsey County and the Ohio Supreme Court, and concludes that at least six of those claims were never presented in such a way that the Ohio courts could fairly rule upon them.

In the claims which this Court has designated as Claims 1.2, 1.4, 1.6, 1.10, 1.12, and 1.14, petitioner argues that Ohio's death penalty scheme is unconstitutional because it requires proof of aggravating circumstances during the guilt phase of the capital case; penalizes defendants who choose to go to trial; permits a presentence investigation report with improper information to go to the sentencer; precludes the sentencer from using sympathy or mercy to choose a lesser sentence than death; precludes the sentencer from choosing a life sentence in the absence of any mitigating factors; and, as applied, does not allow the Court of Appeals to conduct an adequate proportionality review because there is a lack of data concerning other similar cases which can be used in that review. The Court has found no argument presented by petitioner either in the Court of Appeals or the Ohio Supreme Court which raises any of these issues. Thus, they have been procedurally defaulted. Because petitioner has not offered any cause for the procedural default, these claims are waived for purposes of federal habeas corpus review.

Respondent also contends that another of petitioner's constitutional claims, which this Court has designated as Claim 1.17 and which asserts that the death penalty is cruel and unusual punishment per se, has been waived because it was not fairly presented to the Ohio courts. In his seventh and eighth assignments of error in the Court of Appeals, which were repeated as Propositions of Law 7 and 8 in his appeal to the Ohio Supreme Court, petitioner argued that the death penalty is unconstitutional under, *inter alia*, the Eighth Amendment to the United States Constitution. Although his supporting, argument did not directly assert that the death penalty is 'unconstitutional in all circumstances, in arguing these two propositions, especially Proposition of Law 7, petitioner contended that the death penalty is unconstitutional because the incapacitation of the offender could be achieved by a life sentence without chance of parole for either 20 or 30 years, that retribution is an improper justification for the death

penalty, and that there is no evidence that it serves as a deterrent. Under those circumstances, petitioner argued that the death penalty could not legitimately be imposed. In the Court's view, this is sufficiently close to asserting that the death penalty is unconstitutional per se to preclude a finding that this argument has been waived.

Next, respondent asserts that Claim Three, in which petitioner asserts that his waiver of the right to a jury trial was not knowing, voluntary, and intelligent, was waived because it was never properly presented to the state courts. Respondent concedes that an issue relating to the validity of the jury waiver was raised in petitioner's post-conviction petition, but contends that because the issue was treated differently on appeal, it was not fairly presented either to the Court of Appeals or to the Ohio Supreme Court. In order to address this argument, it is necessary to review in some detail both the post-conviction petition and the issues raised on appeal from the denial of that petition.

In the post-conviction petition, which was filed on October 11, 1988, petitioner raised four claims for relief. In his first claim, he asserted that he was denied the effective assistance of counsel during the guilt determination of his case (i.e., the guilty plea colloquy), and that this ineffective assistance rendered his guilty plea involuntary. As a sub-part of that claim, he contended that counsel's advice to him to waive a jury, premised upon the fact that a police officer had recently been shot and killed in Guernsey County during jury selection and that it would be hard to get a fair trial with a Guernsey County jury under those circumstances, was improper advice, and that counsel should have renewed a motion for a change of venue instead of recommending a jury waiver. (Post-conviction Petition, Exhibit KK, at 8-9). That claim is restated in the amended post-conviction petition which was filed on November 18, 1988. In its decision, the trial court concluded that the decision to waive a jury was a

reasonable trial tactic. (Decision of November 27, 1989, Exhibit PP, ¶18).

On appeal, petitioner raised six assignments of error. The first assignment asserted that the waiver of a jury trial was invalid because of the ineffective assistance of trial counsel. (See Appellant's Brief and Assignments of Error filed February 26, 1990, Exhibit RR). In its opinion issued on July 23, 1990, the Court of Appeals concurred with the trial court's judgment that this was a "plausible and reasonable strategic decision" and affirmed on this issue. (Exhibit TT, at 5). The issue was presented to the Ohio Supreme Court in the same way. (See Appellant's Memorandum in Support of Jurisdiction filed September 20, 1990, Exhibit VV, at 5).

In his habeas corpus petition filed in this Court, petitioner asserts not that trial counsel was ineffective for inducing him to waive a jury trial, but that the waiver itself was not knowing, voluntary, and intelligent. He contends that the trial court did not hold an adequate hearing to determine whether he was voluntarily, knowingly, and intelligently waiving his right to a jury trial, and that this Court can, as a result of that failure, set aside the waiver.

The failure of the trial court to hold an adequate hearing with respect to the jury trial waiver is an issue that should have been raised on direct appeal, because it is something that would appear on the face of the record. However, a review of the direct appeal does not reveal that this claim was ever raised. Further, to the extent that the involuntariness of the jury waiver itself depended upon matters outside the record, such as advice given by counsel to petitioner outside of the presence of the court, such a claim could have been raised in the post-conviction petition: Rather than raising it directly, petitioner chose to present it as a claim of ineffective assistance of counsel. Although the ineffective assistance of counsel claim and the involuntary nature of the jury trial

waiver based upon improper advice of counsel may depend upon the same set of facts, they are conceptually distinct. A different constitutional analysis is required for each. Because petitioner chose to present this issue to the state court only as an ineffective assistance of trial counsel claim, and because he never raised directly, either during the course of his direct appeals or during the course of the post-conviction proceedings, the claim that his jury trial waiver was involuntary, unknowing, and unintelligent, that claim is also procedurally defaulted. Again, since petitioner has made no argument that cause excused his failure to raise this claim, it is waived for purposes of federal habeas corpus review.

Finally, respondent contends that the second part of the fifth claim, in which petitioner asserts that it was error for the trial court to deny his motion for a new trial without his personal presence during the proceedings, and that counsel was ineffective for failing to develop the record fully as to the involuntary nature of his guilty plea, has also been waived.

As noted in the procedural history outlined above, petitioner filed his motion for a new trial while his direct appeal was pending. When it was denied, the appeal of that denial was consolidated with the direct appeal. A single assignment of error was asserted relating to the motion for a new trial or new sentencing hearing. The only argument presented in support of that assignment of error (which stated that the trial court had erred in denying the motion) was that, on the merits, the motion should have been granted because the evidence showed that the State of Ohio, after obtaining a death sentence in petitioner's case by asserting that he was the principal offender, presented evidence in the co-defendant's trial that Wesley, rather than Stumpf, was the principal offender; and' that the trial court lacked jurisdiction

to render its ruling because the ruling was made by a two-judge panel, the third of the original three judges having died prior to the hearing.

Clearly, to the extent that petitioner argues in his habeas corpus petition that his presence was required at this stage of the proceedings before the Court could make a proper ruling, that issue was apparent from the face of the record and could have been raised on direct appeal. Since it was not, and petitioner has offered no excuse for his failure to raise that issue on direct appeal, that portion of the claim has been waived.

The other portion of the second part of petitioner's fifth claim is counsel's ineffectiveness for failing fully to develop the presentation of evidence as to why the guilty plea was not entered into knowingly, intelligently, and voluntarily. To some extent, that is a claim which should have been raised on direct appeal because it deals with the sufficiency of the record before the trial court. However, because it hinges on a claim of ineffective assistance of counsel, and the same counsel represented petitioner on direct appeal as at the trial and the motion for a new trial, the proper place to have raised that issue would have been in the post-conviction petition.

The third claim for relief in the post-conviction petition relates to the motion for a new trial. (Exhibit KK, at 19). One of petitioner's assertions was that counsel neglected to assure his presence at the hearing on the motion, which, again, is conceptually distinct from an assertion that the ruling itself was invalid because petitioner was not present at the hearing. However, the second part of that claim (Exhibit KK at 20), states in full as follows: "Counsel did not fully develop the presentation of evidence as to why my plea was not knowingly, intelligently and voluntarily made . . . ." The briefs on appeal contain sufficient references to the inadequacy of the record at the guilty plea proceeding to

preserve this issue for state court review. Consequently, the Court cannot find that this portion of the second of petitioner's fifth claims for relief has been waived.

IV. CONCLUSION

Based upon the foregoing, the Court finds that the following claims presented in the petition have been waived due to procedural default: Claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, Claim 3, and that portion of the second of petitioner's fifth claims which contends that the trial court erred in deciding his motion for a new trial without his personal presence. However, Claim 1.17 and that portion of the fifth claim which raises ineffective assistance of counsel for failing to develop the record as to the involuntary nature of petitioner's guilty plea have not been waived. The Court will issue a subsequent order dealing with the merits of those and other claims which have been properly preserved for federal habeas review.

/s/George T. Smith
United States District Judge

APPENDIX G

Supreme Court of Ohio

No. 86-1118

THE STATE OF OHIO, APPELLEE,

v.

STUMPF, APPELLANT

APPEAL from the Court of Appeals for Guernsey County.

In May 1984, Clyde Daniel Wesley and his friend, Norman Leroy Edmonds, set out from Texas in Edmonds' 1977 brown Pontiac Grand Prix. Edmonds took along his nine millimeter automatic handgun and a chrome-plated Raven .25 caliber automatic. Wesley had a .25 caliber Armi automatic. The two had finished their jobs as construction workers and planned to look for work in Florida. But first, Wesley wanted to stop in Washington, Pennsylvania to see his son. Along the way they stole a car in Oklahoma.

On May 13, the two arrived in Washington, Pennsylvania. The next day, with their weapons and a supply of beer in Edmonds' car, they made a call on appellant, John David Stumpf, a friend of Wesley. Stumpf joined them.

The three went to a bar in Washington where they drank six to eight beers. Then the three began driving around, drinking from the supply of beer in the car. Stumpf asked to see the .25 caliber Raven and Edmonds handed it to him. They drove into Ohio. As they drove and drank,

Wesley told Edmonds (who was driving) to pass another car on the roadway. As they did, Wesley, for sport, took a shot at the driver of the other car.

It was dusk when the three stopped along I-70. Saying they had to make a phone call, Stumpf and Wesley set out on foot for a nearby house (one hundred to one hundred fifty yards from the interstate), leaving Edmonds in the car.

Stumpf and Wesley rang the back doorbell. Mr. and Mrs. Norman Stout, who lived in the house, were seated at their kitchen table. Mary Jane Stout was paying bills. Norman Stout went to the door.

Stumpf and Wesley asked to use the phone and were invited in. After he finished with the phone, Stumpf took out his handkerchief and wiped it off.

Stumpf then asked Wesley, "Are you ready? Are you ready?"

"Not yet," Wesley answered.

Stumpf asked the question several times and received the same answer. During this time Norman Stout was cleaning his fingernails with a pocket knife. As Mr. Stout returned the knife to his pocket, Stumpf asked once more, "Are you ready?"

"Now, yes," said Wesley. The two turned, produced pistols and Wesley announced a robbery. Mr. Stout surrendered his billfold, which contained $117.

The Stouts were herded down the hall to a bedroom. There, Stumpf held the Stouts at gunpoint while Wesley ransacked the house. As Wesley continued his search, Stumpf's hand began to shake, holding the gun on the Stouts.

Norman Stout decided to walk around to the end of the bed. When he reached the end of the bed, Stumpf shot him between the eyes with the chrome-plated .25 caliber Raven automatic.

Stout kept going and grabbed Stumpf. The two grappled. Mr. Stout was pushed across the hall into another bedroom. He suffered a bruise consistent with being struck by the butt of a gun.

Mr. Stout does not remember being shot a second time, though a second bullet entered the top of his head. When he regained consciousness he was lying on the floor of the across-the-hall bedroom. He heard two male voices conversing in a normal tone. Then he heard the four shots that killed his wife. His next recollection was in the ambulance, on the way to the hospital. Mary Jane Stout, while still on the bed, was shot three times in the left side of her face and once in the left wrist.

Stumpf and Wesley left in Mary Jane Stout's Plymouth. Along the highway, Stumpf threw the pistol that had been used to shoot both Stouts out the window.

Meanwhile, Edmonds, back in his car, saw the outside floodlights come on at the Stout house. The garage door opened and a car backed out. Unbeknownst to Edmonds, it was Stumpf and Wesley in the car stolen from Mary Jane Stout. Edmonds became frightened and drove away. He stopped for gas in New Concord, Ohio and made a call to his family in Texas. When he left the gas station without paying, he was chased by two men. After stopping his car, he fired the nine millimeter pistol at them when they approached. Edmonds then turned the car and headed back to Washington, Pennsylvania.

On the day after the murder, Stumpf and Wesley abandoned Mrs. Stout's car. Before so doing, Stumpf wiped the car down because he "didn't want to get involved with it."

Stumpf, Wesley and Edmonds reunited in Pennsylvania. Edmonds wanted to sell his nine millimeter pistol to obtain traveling money for a return to Texas. Stumpf made a telephone call to arrange the sale. Stumpf took Wesley and Edmonds to the house of John Dino who bought the nine millimeter pistol and a .357 Magnum which had been stolen from Mr. Stout. Edmonds and Wesley then drove back to Texas.

Edmonds, traced by the long distance call, was arrested and told what he knew. Stumpf, upon learning of the warrant for his arrest, surrendered. At first he denied being in the Stout home, but upon being told that Norman Stout had survived, he admitted robbing the Stouts, admitted shooting Mr. Stout and admitted holding the Stouts at gunpoint. He said he left the Stout home after shooting Mr. Stout, and denied shooting Mrs. Stout. Later he changed his story again, claiming that he and Wesley had switched weapons and that he had never fired the chrome-plated Raven. However, Mr. Stout remembered being shot by Stumpf with the chrome-plated Raven and so testified at trial. He also picked Stumpf out of a photo line-up that included Wesley and Edmonds.

The four bullets removed from Mary Jane Stout's body and the bullet from the wound to the top of Norman Stout's head were all fired from the same .25 caliber weapon. The bullet fragment extracted from Norman Stout's forehead was too small to compare, but it did have the same width rifling marks as the other bullets that struck Norman and Mary Jane Stout. In all, eight spent .25 caliber shell casings were

recovered from the bedrooms and hallway, seven fired by the same weapon. The other one was fired by Wesley's Armi .25 caliber pistol.

Mr. Stout is left with numbness and lack of dexterity in his left arm, a loss of bowel and bladder control, and impaired ability to concentrate and remember. His disabilities are permanent.

Appellant, Stumpf, was indicted for aggravated murder (with four specifications), attempted aggravated murder (with one specification), aggravated robbery (with one specification), grand theft of an automobile, and grand theft of a firearm. Stumpf waived a trial by jury and requested a trial to a panel of three judges. Thereafter, he pleaded guilty to: (1) count one of the indictment, aggravated murder, in violation of R.C. 2903.01(B); (2) specification one of count one, the offense being committed for the purpose of escaping detection, apprehension, trial, or punishment for the other offenses of aggravated robbery and attempted aggravated murder, R.C. 2929.04(A)(3); (3) specification four of count one, use of a firearm while committing a felony, R.C. 2941.141; (4) the second count in the indictment, attempted aggravated murder, in violation of R.C. 2923.02(A); and (5) the specification to the second count, use of a firearm while committing a felony, R.C. 2941.141. The three-judge panel, after hearing the evidence, unanimously found Stumpf guilty beyond a reasonable doubt of all the charges to which he had pleaded guilty.

At his sentencing hearing, Stumpf presented evidence in mitigation that although he dropped out of school in the tenth grade, he worked to his capacity during the fifth and sixth grades. Also, he lacked a significant history of convictions or juvenile adjudications. Various family members and friends testified as to their opinions that he did not display a violent temper, helped people, respected women, worked hard, and

was not a person who displayed leadership qualities. At the time of the offense, Stumpf was twenty-three years old.

Stumpf declined to be sworn. He made an unsworn statement on his own behalf admitting he went to the Stouts' home armed with a pistol. He claimed that Wesley was the one who used the telephone. He admitted holding the Stouts at gunpoint but said he was frightened and nervous; that Mr. Stout lunged at him and "[t]he gun went off." He said Mr. Stout shoved him across the hall into another bedroom. Stumpf said that Mr. Stout, although shot in the head, was able to knock the guns from both his and Wesley's hands. Stumpf claimed that Wesley said "shoot him"; and that Stumpf looked down and saw Wesley's black Armi .25. Stumpf said "I picked Dan's gun up and I fired and then at that time Mr. Stout fell on the floor." Stumpf said he went to the basement, backed the car out of the garage and was joined by Wesley. He denied shooting Mrs. Stout or being in the house when that happened. Stumpf said he was sorry for his acts.

The three-judge panel, after hearing the evidence, issued a separate opinion in which the judges unanimously concluded that the aggravating circumstances sufficiently outweighed the mitigating factors. Thus, the panel sentenced John David Stumpf to death.

On October 7, 1985, two of the three judges overruled Stumpf's motion for leave to withdraw his guilty plea or, in the alternative, to set aside his death sentence and order that a new sentencing hearing be conducted. The third judge had died during the interim.

On May 22, 1986, the court of appeals, pursuant to the mandate of R.C. 2929.05(A), reviewed the trial court proceedings, independently weighed the aggravating circumstance against the mitigating factors, and independently

considered whether the death sentence was appropriate. The court of appeals affirmed Stumpf's convictions and his death sentence.

For his limited testimony, Edmonds was permitted to plead guilty to involuntary manslaughter and aggravated robbery, and received a sentence of seven to twenty-five years concurrent with any sentence he received in Muskingum County for the gas station shooting. Wesley was subsequently found guilty of the same charges as Stumpf. In Wesley's trial by jury, the state presented testimony by Wesley's cellmate, James Eastman, to the effect that Wesley had admitted killing Mrs. Stout himself. It is undisputed that Wesley received a sentence of life imprisonment.

The cause is before this court upon an appeal as of right.

DISPOSITION: Judgment affirmed.

SYLLABUS:

1. Under R.C. 2929.03(F), a trial court or three-judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.

2. Under R.C. 2929.04(B), evidence of an offender's history, background and character which the jury, trial court, or panel of three judges considered, but did not find to be mitigating, need be given little or no weight against the aggravating circumstances.

COUNSEL: C. Keith Plummer, prosecuting attorney, and James R. Scott, for appellee. Lewis M. Tingle and Craig Stephens, for appellant.

JUDGES: BROWN, J., MOYER, C.J., SWEENEY, LOCHER, HOLMES, DOUGLAS and WRIGHT, JJ., concur.

OPINION BY: BROWN

OPINION

As with every case in which the death penalty has been imposed, the instant appeal presents us with a three-step task, pursuant to R.C. 2929.05. First, we must consider the specific issues raised by appellant in his propositions of law. Second, we must independently weigh the aggravating circumstance of which appellant was found guilty beyond a reasonable doubt against the mitigating factors. Finally, we must independently decide whether the death sentence is appropriate in this case, and whether it is proportionate to the penalty imposed in similar cases. For the reasons set forth below, we affirm the judgment of the court of appeals and uphold the sentence of death.

A

Appellant's first proposition of law contends that the three-judge panel failed to adequately comply with R.C. 2929.03(F), which provides in part:

"The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code*, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, *and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.* * * *" (Emphasis added.)

The three-judge panel did list their reasons for finding that the aggravating circumstance sufficiently outweighed the mitigating factors. n1 However, appellant claims that such reasons fail to "bear a direct relation" to the specific aggravating circumstance of which he was found guilty, to wit: the murder of Mrs. Stout to escape detection, apprehension, trial or punishment for other offenses (attempted aggravated murder and aggravated robbery).

n1 The three-judge panel found:

"D. REASONS WHY THE AGGRAVATING CIRCUMSTANCES THE OFFENDER WAS FOUND GUILTY OF COMMITTING WERE SUFFICIENT TO OUTWEIGH THE MITIGATING FACTORS:

"1. The Court finds beyond a reasonable doubt that the Defendant was the principal offender in count one of the indictment.

"2. The methodical manner in which the Defendant and his companion entered the house of the victims and assumed control of the victims. Examples:

"a. Wiping of fingerprints from the telephone.

"b. The dialogue of the Defendant with his companion. * * *

"c. The initiative taken by the Defendant in the course of that dialogue leading up to and directing the victims into the bedroom.

"d. Continual holding [of] both victims at gunpoint by the Defendant.

"e. The Defendant shooting the male victim at close range between the eyes.

"f. The Defendant firing a second shot into the head of the male victim.

"g. The Defendant and his companion engaging in dialogue in the proximity of the male victim followed by four shots, the bullets of which were found in the head and body of Mary Jane Stout.

"3. Failure of the Defendant and his companion to render assistance to the victims.

"4. Defendant and his companion fleeing immediately from the scene with the victims' automobile and personal property including firearms and ammunition.

"5. The Defendant actively participated in the sale of guns stolen from the home of the victims.

"6. The Course of conduct of the Defendant both before and after the commission of the offense in the travel through the country with a quantity of beer and guns.

"7. The Defendant's companion firing a gun into a passing vehicle in [*sic*] route.

"8. The Defendant made no effort to disassociate himself from his companions.

"9. The direct evidence of a gang operation of robbery, assault and other crimes."

The three-judge panel, in stating its reasons, relies heavily upon the nature and circumstances of appellant's offense. Appellant's argument thus assumes that the nature and circumstances of his offense cannot be cited as reasons for, and bear no relation to, the finding that the aggravating circumstance sufficiently outweighs the mitigating factors.

This assumption is erroneous. R.C. 2929.04(B) *requires* the jury, trial court, or three-judge panel to "*consider*, and weigh against the aggravating circumstances proved beyond a reasonable doubt, *the nature and circumstances of the offense* * * *." (Emphasis added.) In a particular case, the nature and circumstances of the offense may have a mitigating impact, or they may not. See *State v. Steffen* (1987), 31 Ohio St. 3d 111, 117, 31 OBR 273, 278, 509 N.E. 2d 383, 390. Either way, they must be considered.

Reading R.C. 2929.03(F) and 2929.04(B) *in pari materia*, it would be illogical to require a three-judge panel to consider the nature and circumstances of the offense in making its decisions whether the aggravating circumstances were sufficient to outweigh the mitigating factors, yet to forbid that panel from relying upon and citing such nature and circumstances as reasons for its decision.

We therefore hold that under R.C. 2929.03(F), a trial court or three-judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.

B

In his second proposition of law, appellant maintains that the three-judge panel erred by failing to "consider, and weigh against the aggravating circumstances proved beyond a

reasonable doubt, * * * the history, character, and background of the offender * * *," as required by R.C. 2929.04(B).

Appellant introduced exhibits and called witnesses to demonstrate that his history, character and background included certain alleged mitigating factors. The witnesses were cross-examined only briefly or not at all. While some of the exhibits and testimony were unreliable, several witnesses established, among other things, that appellant was a follower and not a leader, that he was generally a hard worker, that he had never had behavioral problems, that he had no significant criminal record, that he had a strong family background, and that he was emotionally stable. The panel recited the alleged mitigating factors on which appellant offered evidence, but found that, with the exception of age at the time of the offense (twenty-three) and his lack of a significant criminal background, appellant had not established any mitigating factors by a preponderance of the evidence. n2

n2 The panel's opinion states:

"A. EXISTENCE OF ANY MITIGATING FACTORS SET FORTH IN DIVISION B OF SECTION 2929.04.

"The Court has considered in accordance with Revised Code of Ohio, Section 2929.04 the following mitigating factors:

"1. The nature and circumstances of the offense.

"2. The history, character and background of the offender. * * *

"We find that the Defendant has established by a preponderance of the evidence the following mitigating factors:

"1. The youth of the offender—age 23.

"2. That although the Defendant had been found guilty of certain offenses in his home community, the Defendant lacked significant history of prior criminal conviction and delinquency adjudications.

"We further find that the Defendant has not established by a preponderance of the evidence Mitigating Factors 1, 2, 3 and 6 as set forth in 2929.04.

"B. EXISTENCE OF ANY OTHER MITIGATING FACTORS.

"The Defendant presented the following factors *which the Court has considered*:

"1. Evidence of character.

"2. Use of alcohol and drugs.

"3. Employment history.

"4. Emotional stability.

"5. Family relationships.

"6. Educational background and native intelligence.

* * *

"7. Unverified and unattested questionnaires on John David Stumpf. * * * The alleged preparer's name appears in response to Question No. 30 with no indication it is or is intended as a signature. The questionnaries [*sic*] were prepared by person or persons unknown.

"8. Summary results of questionnaires. * * *

"9. Leadership qualities.

"Factors 1 through 9 were not established *as mitigating factors* by a preponderance of the evidence." (Emphasis added.)

Appellant claims that the three-judge panel erred in finding that the other factors had not been proven—thus implicitly not weighing them against the aggravating circumstance. Appellant maintains that R.C. 2929.04(B) requires the panel to both consider *and weigh* his history, character, and background as mitigation; therefore, the panel erred when it failed to weigh the factors which it found had not been established by a preponderance of the evidence.

A careful reading of the panel's opinion demonstrates that it found only that such factors were not established *as mitigating factors* by a preponderance of the evidence. As we recently held in *Steffen*, supra, at paragraph two of the syllabus:

"While R.C. 2929.04(B)(7) evinces the legislature's intent that a defendant in a capital case be given wide latitude

to introduce any evidence the defendant considers to be mitigating, this does not mean that the court is necessarily required to accept as mitigating everything offered by the defendant and admitted. The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight."

This reasoning applies with equal force to evidence of the history, character and background of an offender. As with the nature and circumstances of the offense, evidence of a particular offender's history, character and background may be mitigating, or it may not be. R.C. 2929.04(B) requires a trial court or three-judge panel to *consider* such evidence (as did the panel in the cause *sub judice*), but it does not require that court or panel to find that such evidence establishes a mitigating factor or factors. As we explained in *Steffen*, "[e]vidence which is not mitigating is not entitled to any weight as a mitigating factor in determining whether such factors outweigh the aggravating circumstances." *Id.* at 129, 31 OBR at 289, 509 N.E. 2d at 399. Therefore, we hold that under R.C. 2929.04(B), evidence of an offender's history, background and character which the jury, trial court, or panel of three judges considered, but did not find to be mitigating, need be given little or no weight against the aggravating circumstances.

C

In his third proposition of law, appellant claims that his death sentence is disproportionate to the penalties imposed in similar cases. R.C. 2929.05(A) mandates a proportionality review by this court in all cases where a sentence of death has been imposed. *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 15 OBR 311, 473 N.E. 2d 264, paragraph seven of the syllabus; *Steffen*, supra, at 122-123, 31 OBR at 283-284, 509 N.E. 2d at 394. We therefore discuss this issue in Part III of this opinion, infra.

D

Appellant's fourth proposition of law asserts that the three-judge panel, by imposing a requirement (allegedly only *after* the conclusion of his sentencing hearing) that he prove his mitigating factors by a preponderance of the evidence, denied him due process and equal protection and violated R.C. 2929.03(D)(1). R.C. 2929.03(D)(1) provides, in part:

"The defendant shall have the *burden of going forward with the evidence* of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."(Emphasis added.)

In *Jenkins*, supra, we explained that the "burden of going forward" placed upon a defendant by R.C. 2929.03(D)(1) in fact requires him or her to establish the existence of any mitigating factors by a preponderance of the evidence. *Id.* at 171-172, 15 OBR 317-318, 473 N.E. 2d at 275. In *Jenkins*, we relied in part upon the Committee Comment to the former R.C. 2929.03, which provided that "'[m]itigation must be established by a preponderance of the evidence * * *.'" *Id* at 171, 15 OBR at 317, 473 N.E. 2d at 275.

Appellant appears to make two separate arguments: (1) *Jenkins* was wrongly decided on this point, and (2) even if *Jenkins* was correctly decided, the appellant was still denied due process and equal protection because he was not provided with notice that he would have to bear the burden of

proving his mitigating factors by a preponderance of the evidence since *Jenkins* was decided after his sentencing hearing took place.

As to appellant's first argument, we think *Jenkins* sets forth the correct interpretation of R.C. 2929.03(D)(1), and we decline to modify it. R.C. 2929.04(C), which must be read *in pari materia* with R.C. 2929.03(D)(1), provides:

"The *defendant* shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

"The *existence* of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of *section 2929.03 of the Revised Code* by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing." (Emphasis added.)

In *Kennedy v. Walcutt* (1928), 118 Ohio St. 442, 455, 161 N.E. 336, 340, this court explained that "[t]he burden of proof imposed by law upon one who must prove the *existence* of a fact or a thing necessary to be proven in the prosecution or the defense of a lawsuit means the *obligation to show it by proof*." (Emphasis added.) Further, as one leading commentator has summarized: "The most acceptable meaning to be given to the expression, *proof by a preponderance*, seems to be proof which leads the jury to find that *the existence of the contested fact is more probable than its nonexistence*." (Emphasis added.) McCormick, Evidence (3 Ed. Cleary Ed. 1984) 957, Section 339. Finally, as this court emphasized in *Travelers' Ins. Co. v. Gath* (1928), 118 Ohio St. 257, 261, 160 N.E. 710, 711, "a preponderance of evidence means the greater weight of evidence. * * * The

greater weight may be infinitesimal, and it is only necessary that it be sufficient to destroy the equilibrium."

Thus, reading R.C. 2929.03(D)(1) together with R.C. 2929.04(C) demonstrates that it is incumbent upon a defendant to show the *existence* of mitigating factors; hence, as *Jenkins* holds, the defendant bears the burden of establishing such factors by a preponderance of the evidence. Of course, the burden of proving beyond a reasonable doubt that the aggravating circumstance(s) outweighs the mitigating factor(s) is on the state and never shifts.

As to appellant's second argument, we cannot agree that at the time of his sentencing hearing, he had no notice that he would bear the burden of proving his mitigating factors. *Jenkins* did not make new law on this issue. Rather, *Jenkins* sets forth the logical reading of R.C. 2929.03(D)(1). The notice, which appellant claims was lacking, was contained in that statute, the Committee Comment, R.C. 2929.04(C), and prior case law.

E

Appellant's fifth proposition of law maintains that the three-judge panel failed to engage in a meaningful weighing of the mitigating factors against the aggravating circumstance, pursuant to R.C. 2929.03(F). Appellant claims that the panel's opinion is insufficient to comply with the statutory requirements, and thus tends to "trivialize the duty of the [panel] * * * to articulate its reasoning * * *." *State v. Maurer* (1984), 15 Ohio St. 3d 239, 247, 15 OBR 379, 386, 473 N.E. 2d 768, 778.

We have already rejected much of appellant's argument. The panel's opinion clearly and concisely sets forth its findings as to: (1) the existence of any of the mitigating factors listed in R.C. 2929.04(B), (2) the existence of any

other mitigating factors, (3) the aggravating circumstance appellant was found guilty of committing, and (4) the panel's reasons why the aggravating circumstance sufficiently outweighs the mitigating factors. We believe the three-judge panel thereby discharged its duties under R.C. 2929.03(F).

F

In his sixth proposition of law, appellant claims that the aggravating circumstance does not outweigh the mitigating factors. R.C. 2929.05(A) indeed requires us to undertake an independent review of this question, which we set forth in Part II of this opinion, infra.

G

Appellant's seventh proposition of law contends that his death sentence and the statutes authorizing it are unconstitutional because the death penalty is not the least restrictive means by which the state of Ohio can achieve a compelling governmental interest. This court rejected the argument in *Jenkins*, supra, at 168, 15 OBR at 314, 473 N.E. 2d at 272, and we reaffirm *Jenkins* for the reasons set forth therein.

H

Appellant's eighth proposition of law maintains that the Ohio death penalty statutes, as applied to him, violate the constitutional prohibition against cruel and unusual punishment. In *Jenkins*, supra, at 168, 15 OBR at 314, 473 N.E. 2d at 273, we upheld the validity of the death penalty statutes against a similar cruel and unusual punishment

attack. See *id.* at paragraph one of the syllabus. See, also, *Gregg v. Georgia* (1976), 428 U.S. 153, 187. We reaffirm *Jenkins* for the reasons set forth therein.

I

In his ninth proposition of law, appellant argues that the aggravating circumstance set forth in R.C. 2929.04(A)(3) is unconstitutionally overbroad and vague, because it could apply to virtually all aggravated murders when some other crime has also been committed. R.C. 2929.04(A)(3) provides:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to *section 2941.14 of the Revised Code* and proved beyond a reasonable doubt:

"* * *

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender."

We disagree with appellant that subsection (3) fails to define and narrow the class of death-eligible offenders. The unambiguous language of that subsection requires that the offense (for example, the murder of a witness to another crime) be committed for the *purpose* of escaping detection, apprehension, trial or punishment for another, separate offense. The statute neither states nor permits an inference that *every* intended killing which follows another crime allows the death penalty to be imposed.

J

In his tenth proposition of law, appellant contends that the mitigating factors set forth in R.C. 2929.04(B)(1) through (7) are unconstitutionally vague, with the result that the three-judge panel imposed the death penalty upon him in an arbitrary manner. The seven mitigating factors set forth in R.C. 2929.04(B) are drawn broadly in order to provide latitude to a defendant with respect to the introduction of evidence upon and establishment of mitigating circumstances. See *California v. Ramos* (1983), 463 U.S. 992, 998-1001. Indeed, R.C. 2929.04(B)(7) allows a defendant to introduce evidence upon and establish "*[a]ny other factors* that are relevant to the issue of whether the offender should be sentenced to death." (Emphasis added.)

We discern no constitutional infirmity in R.C. 2929.04(B)(1) through (7). These factors are broad enough to enable a defendant to present any favorable evidence relevant to the jury's, trial court's, or three-judge panel's decision whether to impose the death penalty, yet at the same time are sufficiently specific to guide the decision-maker's analysis in weighing the mitigating factors against the aggravating circumstances. See *Proffit v. Florida* (1976), 428 U.S. 242, 257-258. The mitigating factors set forth in R.C. 2929.04(B)(1) through (7) prevent an arbitrary or a mechanical imposition of a death sentence.

K

Appellant asserts in his eleventh proposition of law that the panel erred in denying his motion for leave to set aside his guilty plea or to set aside his sentence and order a new sentencing hearing. Appellant bases this claim upon testimony by a cellmate of Clyde Daniel Wesley. During

Wesley's trial, the cellmate testified that Wesley said that he, Wesley, had shot Mrs. Stout. Wesley was not available to testify at appellant's sentencing hearing.

In order to withdraw a guilty plea after sentencing has taken place, a defendant must show that such withdrawal is necessary to correct manifest injustice. Crim. R. 32.1; *State v. Smith* (1977), 49 Ohio St. 2d 261, 3 O.O. 3d 402, 361 N.E. 2d 1324, paragraph one of the syllabus; *State v. Caraballo* (1985), 17 Ohio St. 3d 66, 67, 17 OBR 132, 477 N.E. 2d 627, 628. Further, "[a] motion made pursuant to Crim. R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *Smith*, supra, at paragraph two of the syllabus. See, also, *Caraballo*, supra, at 67, 17 OBR at 133, 477 N.E. 2d at 628.

A plea of guilty is a complete admission of guilt. By entering his guilty plea to the principal charge and to the specification under R.C. 2929.04(A)(3), appellant admitted that *he* murdered Mary Jane Stout for the purpose of avoiding detection, apprehension, trial or punishment for *his* crimes of attempted aggravated murder and aggravated robbery. Appellant makes no claim that his plea was not entered knowingly, intelligently, and voluntarily. The three-judge panel questioned appellant extensively prior to accepting his guilty plea. He indicated that he made an informed and knowledgeable plea, with full realization as to its effect. Based upon appellant's guilty plea and the evidence adduced at his sentencing hearing, we cannot say that the panel abused its discretion or that appellant met his burden of showing that manifest injustice had occurred. Thus, we uphold the panel's decision not to permit appellant to withdraw his plea.

As to his request to have his sentence set aside and a new sentencing hearing conducted, appellant claims that the

three-judge panel's finding that he was the principal offender, in light of the later testimony from Wesley's cellmate, mandates that his motion be granted. Appellant concedes that R.C. 2929.04(A)(3), the aggravated circumstance to which he pleaded guilty, contains no requirement that he have been the principal offender. Nevertheless, appellant maintains that the testimony would have tended to establish a mitigating factor under R.C. 2929.04(B)(6), and therefore a new sentencing hearing is necessary in order to allow the panel to consider it.

Appellant's motion is similar to a motion for new trial based upon newly discovered evidence, under Crim. R. 33(A)(6). In *State v. Williams* (1975), 43 Ohio St. 2d 88, 72 O.O. 2d 49, 330 N.E. 2d 891, paragraph two of the syllabus, this court held: "The allowance of a motion for a new trial on the grounds of newly discovered evidence is within the competence and discretion of the trial judge; and in the absence of a clear showing of abuse such decision will not be disturbed." We adopt this standard of review for the motion at issue. With the latitude granted to a defendant in presenting evidence of mitigation, such a standard is necessary. A defendant is not entitled to a new sentencing hearing merely by coming forward with some additional evidence after the initial sentencing hearing.

The panel, upon consideration of appellant's motion, apparently determined that Eastman's testimony added insufficient mitigating weight to affect its balancing of the mitigating factors against the aggravating circumstance. See R.C. 2929.04(C). We find no error in that determination. Eastman's testimony is hearsay and, in the face of the evidence adduced at appellant's sentencing hearing, of minimal weight. As such, it is too attenuated to warrant a

vacation of appellant's sentence and a new sentencing hearing. We therefore find that the panel did not abuse its discretion in denying appellant's motion.

L

In appellant's twelfth proposition of law, he maintains that it was error for only two judges to consider his post-sentence motions, inasmuch as R.C. 2945.06 requires a three-judge panel. Three-judge review was precluded here by the death of one of the judges.

R.C. 2945.06 expressly provides that "[t]he judges *or a majority of them* may decide all questions of fact and law arising upon the trial * * *." (Emphasis added.) Unanimity is mandated only when the panel finds a defendant guilty or not guilty. Whether appellant was entitled to withdraw his guilty plea or to a new sentencing hearing were questions of law, properly determined by a majority of the panel.

II

Having considered the issues raised in appellant's propositions of law, we turn to an independent weighing, as required by statute, of the aggravating circumstance and mitigating factors.

The aggravating circumstance which appellant was found guilty of committing beyond a reasonable doubt is that he murdered Mary Jane Stout for the purpose of escaping detection, apprehension, trial, or punishment for the other offenses of aggravated robbery and attempted aggravated murder. R.C. 2929.04(A)(3).

Against this aggravating circumstance we weigh all mitigating factors drawn from: (1) the nature and circumstances of the offense, (2) the history, background and

character of appellant, and (3) any of the factors listed in R.C. 2929.04(B)(1) through (7) which exist in this case.

We find the nature and circumstances of Mrs. Stout's murder to be particularly heinous, as evidenced by: (1) the fact that appellant shot and severely injured Mr. Stout and then, to escape detection, apprehension, trial or punishment, brutally murdered Mrs. Stout; (2) the fact that Mrs. Stout was shot three times in the face after appellant and his co-defendant discussed her fate; and (3) the fact that this senseless slaying of an innocent and unsuspecting citizen occurred after the invasion of her home, which she and her husband voluntarily permitted as an accommodation to passing strangers. We find that the nature and circumstances of this offense are entitled to no weight as mitigation.

At his sentencing hearing, appellant presented a substantial amount of evidence pertaining to his history, background and character. Specifically, appellant presented evidence of the following allegedly mitigating factors: (1) his history of fairly regular employment, (2) his good emotional stability, (3) his strong family background, (4) his average intelligence, (5) his lack of alcohol or drug abuse, and (6) his susceptibility to being directed or dominated by others. In our independent review, we find that all six of these factors are entitled to *some* mitigating weight.

To the aggregate weight of these mitigating factors, we add the weight of the factors set forth in R.C. 2929.04(B)(1) through (7) which are present in this case. We find that factors (1), (2), (3) and (6) are not present and thus are not entitled to any weight. In determining factor (6) not to be present, we find that the testimony of a cellmate during Clyde Wesley's trial is of minimal credibility, especially in light of appellant's guilty plea and the substantial evidence to the contrary adduced during appellant's sentencing hearing.

We find that factors (4) and (5) are present in this case. Appellant was twenty-three at the time of his offense; and we assign some, but not much, weight to that factor. Appellant does not have a significant history of prior criminal convictions and delinquency adjudications; and we assign this factor somewhat greater weight.

Finally, under factor (7), appellant voluntarily turned himself in to the police, pleaded guilty rather than demanding a hopeless trial, and professed remorse for his acts. However, we find that these things are entitled to little weight as mitigation in this case. Appellant turned himself in only after Edmonds had been arrested and had named him as a participant. Further, appellant pleaded guilty and professed remorse only after changing his story several times and after learning that Norman Stout had survived. Under such circumstances, appellant's cooperation with the authorities, guilty plea, and belated remorse are of minimal mitigating value.

Our independent weighing of all the mitigating factors against the aggravating circumstance leads us to conclude that that aggravating circumstance does outweigh the mitigating factors present in this case beyond a reasonable doubt.

III

Our final task is to determine whether the sentence of death is appropriate. In this determination, we must "consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases." R.C. 2929.05(A).

Appellant cites us to several somewhat similar cases which resulted in life sentences, and argues that his sentence was therefore excessive and disproportionate. However, earlier this term in *Steffen*, supra, at paragraph one of the syllabus, we held that "[t]he proportionality review required

by R.C. 2929.05(A) is satisfied by a review of *those cases already decided by the reviewing court in which the death penalty has been imposed*." (Emphasis added.) We further clarified that "proportionality review in this court will be limited to a review of cases we have already announced. No reviewing court need consider any case where the death penalty was *sought but not obtained* or where the death penalty could have been sought but was not." (Emphasis added.) *Id.* at 124, 31 OBR at 284, 509 N.E. 2d at 395.

With that in mind, we now examine the cases in which this court has affirmed the imposition of the death sentence. In *State v. Barnes* (1986), 25 Ohio St. 3d 203, 212, 25 OBR 266, 274, 495 N.E. 2d 922, 929, we summarized the cases to date wherein we had upheld the imposition of the death penalty under the current statutory scheme:

"* * * *State v. Jenkins*, supra (15 Ohio St. 3d 164), involved the murder of a police officer during a bank robbery. In *Jenkins* the defendant was mentally deficient as evidenced by a very low I.Q., and yet the death penalty was upheld. *State v. Maurer* (1984), 15 Ohio St. 3d 239, involved the heinous crimes of rape and murder of a young girl. *State v. Rogers* (1985), 17 Ohio St. 3d 174 [vacated *sub nom. Rogers v. Ohio* (1985), 474 U.S. , 88 L. Ed. 2d 452, *on remand* (1986), 28 Ohio St. 3d 427, 28 OBR 480, 504 N.E. 2d 52, *reversed on other grounds* (1987), 32 Ohio St. 3d 70, 512 N.E. 2d 581], dealt with a similarly heinous fact pattern and a defendant with extreme mental problems. In both of these cases this court (with the exception of Justice Wright in *Rogers*) found the death penalty appropriate. *State v.* Mapes (1985), 19 Ohio St. 3d 108, and *State v. Martin* (1985), 19 Ohio St. 3d 122, * * * involved robbery-murder and defendants with no significant evidence offered in mitigation. This court found capital punishment an appropriate sentence for these types of cases. In *State v. Williams* (1986), 23 Ohio St. 3d 16, where robbery was again the aggravating

circumstance and an elderly woman was the victim, this court upheld a death sentence. In addition, this court recently upheld a death sentence in *State v. Buell* (1986), 22 Ohio St. 3d 124, for murder during a kidnapping. Finally, this court upheld death sentences in *State v. Brooks* (1986), 25 Ohio St. 3d 144, involving the murders of the defendant's three sons."

Barnes, supra, involved the murder of a night porter at a bar during the commission of aggravated burglary and aggravated robbery. In *State v. Scott* (1986), 26 Ohio St. 3d 92, 26 OBR 79, 497 N.E. 2d 55, we upheld a death sentence imposed for the murder of the owner of a delicatessen during an aggravated robbery of her establishment. *State v. Glenn* (1986), 28 Ohio St. 3d 451, 28 OBR 501, 504 N.E. 2d 701, involved the murder of a reserve deputy sheriff while he was transporting a prisoner, in a squad car. In *Steffen*, supra, we upheld the imposition of a death sentence for the rape and murder of a young woman during an aggravated burglary. Finally, in *State v. Zuern* (1987), 32 Ohio St. 3d 56, 512 N.E. 2d 585, we upheld a death sentence imposed for the murder of a corrections officer in a detention facility.

From our review of the relevant cases, we conclude the imposition of the death penalty in the cause *sub judice* is neither excessive nor disproportionate. Further, the fact that appellant's co-defendant Wesley received a life sentence with parole eligibility after twenty years for his part in Mrs. Stout's murder is not an impediment to affirming the death sentence in the instant case. The life sentence given to Wesley is the verdict of a jury in a separate trial. Proportionality review in the cause *sub judice* does not require a reweighing of the aggravating circumstances against the mitigating factors in Wesley's case.

Finally, we believe that a sentence of death is an appropriate penalty for the calculated execution of Mary Jane Stout, committed in order to escape detection, apprehension,

trial or punishment for appellant's other offenses (the aggravated robbery of the Stouts and the attempted aggravated murder of Norman Stout).

IV

We have completed our review of the record in the cause *sub judice*. We conclude that the three-judge panel properly weighed the aggravating circumstance against the mitigating factors. We are convinced beyond a reasonable doubt that the evidence supports the panel's determination that the aggravating circumstance that appellant was found guilty of committing outweighs the mitigating factors, and we are persuaded from our independent review to make that same determination. Lastly, we find that the imposition of a death sentence is neither excessive nor disproportionate, and we believe that sentence to be appropriate under the circumstances of this case.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. 87-6019

Stumpf, John David, Petitioner
v.

Ohio

February 22, 1988

JUDGES: Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy

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OPINION

The petition for writ of certiorari to the Supreme Court of Ohio is denied.

DISSENT BY: Brennan; Marshall

DISSENT

Justice Brennan and Justice Marshall dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. 87-6019

Stumpf, John D.

v.

Ohio

April 18, 1988

JUDGES: Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy

OPINION

The petition for rehearing is denied.

APPENDIX J

Court of Appeals of Ohio
Fifth Appellate District
Guernsey County

Case Nos. CA-760, CA-793

STATE OF OHIO, Plaintiff-Appellee,
vs.
JOHN DAVID STUMPF, Defendant-Appellant.

Criminal Appeal from Court of Common Pleas,
Case No. 9684

May 22, 1986

JUDGES: MILLIGAN, J. concurs.
WISE, J. concurs and dissents separately.

COUNSEL: For Plaintiff-Appellee: C. KEITH PLUMMER Prosecuting Attorney, 139 Courthouse Square Cambridge, Oh 43725; JAMES R. SCOTT Special Assistant Prosecuting Attorney, 139 Courthouse Square, Cambridge, OH 43725
For Defendant-Appellant: LEWIS M. TINGLE 138 N. Seventh St., Cambridge, OH 43725; CRAIG STEPHENS 206 S. Meridian St. Ravenna, Oh 44266

OPINION BY: PUTMAN

OPINION

JOURNAL ENTRY OF JUDGMENT AND OPINION
AND FINDINGS OF THE COURT

PUTMAN, P.J.

Appeal Case No. 760 is from a death sentence and appeal Case No. 793 is from the judgment denying the motion to withdraw the plea of guilty that led to the conviction and sentence.

We affirm both judgments.

We also have independently given de novo consideration to the record and make the certifications upon the issues enumerated in R.C. 2929.05.

Our reasons follow.

Very little is in dispute in this case. Appellant's major thrust has been that the state accused him of acting in concert with one Clyde Wesley in killing the victim, and in a subsequent separate trial, convicted Wesley of being a direct actor in the same killing for which Wesley escaped the death penalty. The argument is made that for that reason the death penalty is, within the meaning of R.C. 2929.05, "excessive or disproportionate to the penalty imposed in similar cases." Appellant urges this as a matter of error review and also independently addresses that argument to our de novo consideration.

We reject the argument that where two or more persons act in concert as principal offenders none may be lawfully executed unless all are. Logically this is a reprise of the old theme that no one may be the first to die. We rejected this in State v. Maurer. The 1984 affirmance of judgment is reported in 15 Ohio St.3d 239.

The more significant question is the proper handling of that subsequent "mercy verdict" in our de novo consideration reviewing and independently weighing all of the facts and other evidence disclosed in the record. Should we elect to withhold our independent approval of the death penalty because of it?

By agreement of the prosecutor the appellant has been given leave to raise that issue as a supplement to his assignments of error upon the direct appeal (Case No. 760) as well as the appeal from the denial of the motion to withdraw the guilty plea (Case No. 793). We handle it on the law side in both cases and de novo as a factual consideration in the direct appeal from the death sentence.

A more detailed statement follows.

STATEMENT OF THE CASE

Appellant concedes the accuracy of the following statement of the case contained in the state's brief.

During the May, 1984 term of court, the Guernsey County Grand Jury returned a five count indictment against John Stumpf, defendant-appellant herein. Stumpf was charged with the May 14, 1984 aggravated murder of Mary Jane Stout, and the attempted murder of her husband, Norman Stout, as well as aggravated robbery, grand theft of a motor vehicle and grand theft of a firearm. Amended without objection, count one alleged that the purposeful killing of Mrs. Stout took place during an aggravated robbery. Count one contained the additional specifications that the purposeful killing was committed to escape detection, apprehension, trial and punishment for the crimes of attempted aggravated murder and aggravated robbery; that the killing was part of a course of conduct involving the purposeful killing or attempt to kill two persons; that the killing was committed in the course of

an aggravated robbery and appellant Stumpf was the principal offender of the aggravated murder and, finally, that the offenses were committed while the offender was armed with a firearm.

Count two alleged the attempted aggravated murder of Norman Stout, committed in the course of an aggravated robbery. The indictment included firearms specifications as well as counts for aggravated robbery and grand theft.

Appellant waived trial by jury and three judges were impaneled to hear the case pursuant to R.C. 2945.06. On September 17, 1984, appellant entered a guilty plea to count one of the indictment, the aggravated murder of Mary Jane Stout. Appellant also entered a guilty plea to specification one, admitting that his purposeful murder of Mary Jane Stout was done to escape detection, apprehension, trial or punishment for aggravated robbery and the attempted aggravated murder of Norman Stout. Appellant also entered a guilty plea to count two, the attempted aggravated murder of Norman Stout and two gun specifications, R.C. 2929.71. Pursuant to R.C. 2945.06, the three judge panel heard witnesses and evidence, accepted the pleas, and found appellant guilty of the offenses and the specifications.

Following the hearing conducted pursuant to R.C. 2929.03, the panel unanimously found that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. The three judge panel imposed the death penalty for the aggravated murder of Mary Jane Stout, and a term of seven to twenty-five years for the attempted aggravated murder of Norman Stout. An additional term of three years actual incarceration was imposed on the firearm specification. On the same date, the three judge panel filed a separate opinion pursuant to R.C. 2929.03(F) stating its specific findings as to the existence of any mitigating factors, the aggravating circumstances, and the reasons why the

aggravating circumstances, and the reasons why the aggravating circumstances outweighed any mitigating factors. Appellant filed a timely notice of appeal from that judgment of the trial court which appeal is currently pending before this court under Case No. CA-760.

Subsequent to appellant's guilty pleas and sentence, co-defendant Clyde Wesley was tried before a jury for the identical crimes. Wesley was found guilty. The jury recommended a sentence of life imprisonment with parole eligibility after twenty years. At Wesley's trial, an inmate of the jail testified that Wesley had declared to him that he, Wesley, had shot Mary Jane Stout. Based on this testimony, appellant Stumpf moved the trial court for leave to withdraw his guilty plea or in the alternative, for a new sentencing hearing. The trial court overruled the motions. Appellant now seeks review by this court.

STATEMENT OF THE FACTS

The appellant states the facts as follows.

On May 11, 1984, two friends, Clyde Daniel Wesley and Norman Leroy Edmonds, left the State of Texas in Edmond's car. They took with them a 25 caliber RAVEN automatic and Italian 9 millimeter automatic handgun, both owned by Edmonds along with another 25 caliber pistol owned by Wesley. Their destination was Washington, Pennsylvania, and along the way, Wesley stole a car in Oklahoma.

They were unemployed at the time and their intention was to see relatives in Pennsylvania and then go on to Florida. In addition to the guns, they traveled with a supply of beer in their vehicle.

Wesley had lived in Pennsylvania near the defendant John Stumpf prior to moving to Texas and on May 14, he and Edmonds drove to Stumpf's residence in Cannonsburg, Pennsylvania. The three then went to a bar in Edmonds' car. After consuming six or eight beers, they left the bar and began driving around. Wesley was driving with Edmonds in the front seat and John Stumpf in the back. More beer was available in the car and was being consumed to the point of intoxication. Due to Wesley's bad driving, Edmonds took over and Wesley sat in the front passenger seat.

The car was driven from Pennsylvania to Ohio and while passing through Belmont County, Edmonds passed another vehicle. At that point, Wesley, using the 9 mm. pistol and without provocation, shot the driver of the vehicle they were passing. Later, Edmonds stopped the car along Interstate 70 in Guernsey County, at a time when it was just getting dark. Wesley suggested they go to the Stout residence, so he and John Stumpf went down an embankment and toward the house while Edmonds waited at the car. They asked to use the phone and were admitted into the Stout residence by Mr. Stout. Once in the residence, two of the guns which Wesley brought from Texas were produced. Mr. and Mrs. Stout were held at gunpoint, and were told by Wesley that "this was a stickup."

John Stumpf became noticeably upset and nervous as he stayed with Mr. and Mrs. Stout, while Wesley went through the house searching for items to steal. Mr. and Mrs. Stout were seated on a bed in the bedroom while Wesley was out of the room. Mr. Stout got up and moved toward John Stumpf. At this point, John Stumpf described himself as being very nervous and scared, and the gun went off with the bullet striking Mr. Stout in the head.

Mr. Stout continued toward John Stumpf, grabbed him and shoved him out of the bedroom where Mrs. Stout

remained. During this scuffle, Stumpf dropped his gun. Mr. Stout's momentum carried him across the hall where he scuffled with Wesley. Wesley's gun fell to the floor and at Wesley's urging, Stumpf picked it up and fired toward Mr. Stout, although Mr. Stout can't recall this part of the incident.

Mr. Stout has no specific recollection beyond this point, except for hearing voices and four gunshots. The only account thereafter comes from the defendant, John Stumpf, who related how Wesley said something to him but he told Wesley he was getting out of there and left the house via the garage. Mrs. Stout was still alive in the bathroom.

Wesley came downstairs to the garage and called John back in to drive the Stout's car. Norman Edmonds had been waiting on the road but then left the scene. He became involved in the theft of gasoline at a nearby service station and when he was chased by individuals from the gas station, he used the 9 mm. which he had kept in the car and fired at them without hitting anyone. Edmonds had made a phone call to his father in Texas from the gas station, which later led to his identification. The three then returned to Pennsylvania, where the Stout's car was left.

Wesley also had Mr. Stout's 357 Magnum pistol in his luggage, which they sold along with Edmonds' 9 mm. pistol. Wesley and Edmonds then left for Texas.

Tracing Edmonds through the phone call to his father resulted in his apprehension, which then resulted in the identification of the other two.

Learning of the warrant for him, John Stumpf went to the police station in Pennsylvania where he met with Lt. Van Horn of the Guernsey County Sheriff's Department. John then waived extradition and returned to Ohio.

For his limited testimony, Edmonds was permitted to enter a plea to a manslaughter charge, and received a sentence of seven to twenty-five years, concurrent with any sentence he received in Muskingum County for the gas station shooting. In the meantime, Clyde Daniel Wesley fought his extradition from the State of Texas. Wesley was indicted on identical charges and specifications as this defendant.

The State of Ohio acting through the prosecutor outlines the facts as follows:

Between nine and ten o'clock p.m. on May 14, 1984, Chris Stout, son of Norman and Mary Jane Stout attempted to reach his parents by telephone at their home. The Stout's residence was located on County Road 44 and was visible from Interstate Highway 70 as it passed through Guernsey County. Mrs. Stout was ill with influenza. Both were expected to be at home. After unsuccessfully telephoning some seven or eight times, Chris Stout contacted a neighbor of his parents, John Barrone. Barrone investigated and found the home open and outdoor emergency lighting on. With this information Chris Stout telephoned police who investigated and found Mrs. Stout slain and Mr. Stout gravely wounded.

Guernsey County Sheriff's Sgt. Mike Warner found Mrs. Stout lying on a bed in one bedroom designated at trial as bedroom number two and Mr. Stout lying on the floor in what was designated as bedroom number one. Both had been shot. Spent .25 caliber shell casings were recovered from the hallway area between the two bedrooms. A bullet was located in the wall of bedroom number two, while another bullet was found in the floor of bedroom number one. Exhibit "J" was a bullet found in the mattress in bedroom number one.

Norman Stout was transported to Bethesda Hospital for emergency treatment of two gunshot wounds to the head. Dr. Albert Camma, neurosurgeon, performed emergency surgery.

Stout had been shot once between the eyes and once in the top of the head. The nasal wound showed powder burns above the bridge of the nose. Dr. Camma observed and "L" shaped bruise on the right forehead which, in his opinion, was consistent with a blow from the butt of a gun. Camma recovered the bullets from both the gunshot between the eyes and the gunshot to the top of the head. Exhibit "G" was the bullet recovered from the wound in the top of the head.

Dr. Thomas Arejola, clinical pathologist, performed the autopsy upon the body of Mary Jane Stout. Arejola found one spent bullet in the victim's left breast pocket. Arejola observed four entrance wounds in the body of Mrs. Stout: three in the face, one in the left wrist. One entrance wound was to the left side of the face, in front of the left ear. A second wound was slightly below the first while the third entered the area of the left jaw. Two bullets were recovered from Mrs. Stout's brain while the third had passed through jaw and neck tissue and lodged in the right shoulder. The four small caliber bullets were turned over to police.

The parties stipulated certain facts. The two bullets removed from the head of Norman Stout, and the four bullets from the body of Mary Jane Stout were admitted into evidence. Two stipulations between the parties, signed by the appellant, were admitted into evidence. In addition, it was shown that the 1976 Plymouth automobile stolen by appellant and Wesley (the subject of count four), belonged to Mary Jane Stout while Exhibit "S" a .357 Magnum revolver subject of count five and also stolen during the robbery, belonged to Norman Stout. It was further shown that Norman Edmonds had purchased a Raven .25 caliber automatic pistol and a 9 mm. TA90 automatic pistol in Texas shortly before joining Wesley and driving to Cannonsburg, Pennsylvania, where they met with appellant. Exhibit "N," a .25 caliber ARMI automatic, black in color, was recovered from Clyde Wesley upon his arrest. The 9 mm. pistol and the .357 Magnum pistol

had been sold to John Dino of Cannonsburg, Pennsylvania and recovered from him by police on May 16, 1984, two days after Mr. Stout was shot and left for dead and Mrs. Stout was shot and killed. Appellant introduced Wesley and Norman Edmonds to John Dino to effectuate the sale.

While appellant and Wesley were engaged in the Stout's home, Norman Edmonds, who had remained in the car, decided to leave the scene. He drove on, stopping in nearby New Concord for gasoline. After filling his tank and making a long distance call to his stepfather in Texas, Edmonds drove away from the filling station without paying for the gasoline. Pursued by two young men from the gas station, Edmonds fired several shots from his 9 mm. pistol and frightened his pursuers away. However, they had obtained a description of Edmonds' car and recorded the license number. Edmonds was tracked down and told authorities of the activities of appellant and Wesley. As a result, appellant was taken into custody in Cannonsburg, Pennsylvania while Wesley was arrested in Texas.

Guernsey County Sheriff's Lt. Arnold Van Horn traveled to Cannonsburg to receive the guns recovered from John Dino and to return appellant to Ohio to face prosecution. After full Miranda advise and waiver, appellant gave a statement to Van Horn in the Cannonsburg Police Station. That statement, Exhibit "GG-2," was read into the record. In this first statement, appellant claimed he remained in the car while Wesley and Edmonds went to the Stout's home.

While driving back to Ohio, appellant asked if Mr. Stout had survived. When Van Horn told him that Mr. Stout was alive and would be able to identify the killers, appellant said that when they reached Cambridge, he would like to make another statement because "there were some things he wanted to get straightened out."

In that second statement made after additional Miranda warnings and waiver, appellant admitted his presence in the house, admitted having a gun in hand, admitted robbing the victims and admitted that he shot Mr. Stout. In his second statement, appellant asserted that after shooting Norman Stout, he left with the gun. Appellant agreed that he had the chrome plated .25 caliber pistol but said he also fired Wesley's black .25 caliber automatic. Appellant denied shooting Mrs. Stout.

After recovering the two guns from John Dino, Lt. Van Horn had a further conversation with appellant resulting in appellant's third statement regarding the events of May 14, 1984. In this third statement, appellant claimed that upon entering the Stout's home, he and Wesley exchanged firearms because appellant was unfamiliar with the operation of the chrome-plated .25 caliber Raven. In this third version of the event, appellant claimed he held Wesley's black .25 caliber ARMI throughout the time they were in the Stout's home and only after they returned to the car did he return the black ARMI to Wesley.

Norman Edmonds entered guilty pleas to the shooting incidents in Muskingum County and was to be sentenced to concurrent terms of seven to twenty-five years. He agreed to testify in the trials of appellant and Wesley. Edmonds and Wesley were construction workers in Texas. After their last job was concluded, they decided to drive to Florida to look for work. However, en route, Wesley wished to detour to his hometown, Cannonsburg, Pennsylvania to see his son. As they left Texas, Edmonds had his 9 mm. automatic and a chrome-plated Raven .25 caliber automatic. Exhibit "N-1," a sample chrome Raven .25 was "almost identical" to Edmonds' pistol. Wesley was armed with the .25 caliber ARMI automatic, Exhibit "N."

In Washington, Pennsylvania, Wesley left Edmonds at a motel. Wesley returned the next day and they drove to Cannonsburg where Wesley introduced Edmonds to appellant. After some drinks in a bar in Washington, the three drove into Ohio. Appellant asked Edmonds to show him his .25 caliber chrome Raven pistol. Edmonds did so. Wesley, who was driving, struck a construction barrel and Edmonds took over driving the car. At a later point, Edmonds was told to stop the car. Saying they had to make a phone call, appellant and Wesley got out and walked toward the Stout's home while Edmonds remained in the car.

Thereafter, Edmonds noticed the outside flood lights come on at the Stout's home. The garage door was opened and a car backed out. Edmonds became frightened and drove away. He admitted stopping for gas in New Concord, calling his family in Texas, and leaving without paying for the gasoline. After being chased and firing the 9 mm. pistol, Edmonds turned around and drove back to Washington, Pennsylvania. The next day, appellant and Wesley showed up. Edmonds told Wesley he wanted to return to Texas, offered him his car and expressed the desire to sell his 9 mm. pistol for traveling money. Appellant made a telephone call to arrange the sale of the gun. Thereafter, appellant took Wesley and Edmonds to John Dino's house and introduced them. Dino bought Edmonds' 9 mm. and the .357 Magnum stolen from Mr. Stout. Edmonds and Wesley then drove back to Texas where Edmonds was arrested on the charges filed in Muskingum County. Interviewed by Guernsey County Sheriff's Lieutenant Van Horn, Edmonds told all he knew and agreed to return to Ohio.

Norman Stout survived two gunshots to the head and testified at appellant's hearing below. On the evening of May 14, 1984, Mr. Stout and his wife were seated at their kitchen table. Mrs. Stout was paying bills. Appellant and a second man knocked at the door and asked to use the

telephone, claiming they were travelers and their car had broken own. (Mr. Stout was unable to identify the second man. However, it is undisputed that the second man was Clyde Wesley.) Mr. Stout identified appellant as the one who did most of the talking. Appellant picked up the telephone " . . . and he did something that no one else had ever done. After he finished with the telephone he took his handkerchief and wiped it off." Mr. Stout began cleaning his fingernails with a pocket knife. Appellant asked Wesley, "Are you ready? Are you ready?" Wesley replied, "Not yet." Stumpf questioned Wesley several more times with the same response. Then, as Mr. Stout returned his knife to his pocket, Stumpf again asked, "Are you ready?" Wesley replied, "Now, yes." Both turned, produced pistols and announced a robbery. Mr. Stout's billfold with $117 was taken. Appellant held the victims at gunpoint while Wesley ransacked the house. Mr. and Mrs. Stout were herded down a hall and into bedroom number two. Mr. Stout observed that appellant and Wesley operated as a well co-ordinated team. Appellant continued to hold both victims at gunpoint in bedroom two. Mr. Stout noticed that appellant's gun hand was wavering and Stout started to walk around the end of the bed. When Mr. Stout reached the end of the bed, appellant shot him between the eyes with the chrome-plated .25 caliber automatic pistol. Stout grappled with appellant, pushing him across the hall into bedroom number one. Mr. Stout was unable to recall being shot the second time in the top of the head. As he regained consciousness he found himself lying on the floor of bedroom number one and heard two male voices conversing in a normal tone of voice. Within a minute Mr. Stout heard the four gunshots which killed his wife. His next recollection was in the ambulance on the way to the hospital.

Stout was positive in his identification of appellant as the gunman with the chrome-plated .25 automatic. He identified the sample Raven .25 as being very similar to that

carried by appellant. Wesley's black ARMI .25 was not the type of gun used to shoot him.

Rondal Dye, firearms and tool mark examiner from the Ohio Bureau of Criminal Identification and Investigation examined the guns, the various spent shell casings from the scene, the bullets removed from Mr. Stout's head and the bullets removed from Mrs. Stout's body. The four bullets removed from Mary Jane Stout's body and the bullet from the wound to the top of Norman Stout's head were all fired from the same .25 caliber firearm. While Exhibit "G" (the bullet from the nasal wound to Mr. Stout) was too small a fragment to compare, it did have the same width rifling as found on "AA" and "F." All remaining characteristics of Exhibit "G" were consistent with having been fired from the same gun which fired the five bullets in Exhibits "AA" and "F." Of the eight spent .25 shell casings recovered from the bedrooms and hallway, seven were fired from one weapon. One was fired from the second gun, Wesley's black ARMI .25. Exhibit "I," the bullet recovered from the wall in bedroom two was fired by the same weapon which fired the bullets recovered from Mr. Stout's head and from Mrs. Stout's body, Exhibits "AA" and "F." Exhibit "J," a bullet recovered from the mattress in bedroom one where Norman Stout was found, was fired by Wesley's black ARMI .25 caliber pistol. Exhibit "T," Edmonds' 9 mm. automatic pistol could not have fired any of the bullets in question. Exhibit "E," a fired bullet (recovered from the floor of bedroom number one where Norman Stout was found), was fired by the same weapon which fired Exhibits "A" and "F," bullets recovered from both victims. Wesley's black ARMI .25 pistol was tested for rapid fire

capability. Dye found that the ammunition clip would not seat properly and, therefore, the pistol would jam, or malfunction. On at least one occasion, it jammed after just one shot.

In mitigation, appellant presented evidence that although he dropped out of school in the ninth grade, he worked to his capacity during the fifth and sixth grades. Although appellant had some prior contact with the courts, he lacked a significant history of convictions or juvenile adjudications. Various family members and friends were of the opinion that appellant did not display a violent temper, helped people, respected women, worked hard, and was not a person who displayed significant leadership qualities.

Appellant declined to be sworn, but made an unsworn statement on his own behalf explaining his version of the events. In his statement, appellant admitted he went to the Stout's home armed with a pistol; claimed Wesley was the one who actually touched the telephone and wiped off his fingerprints; agreed they pulled guns and that he announced the robbery. Appellant asserted he was frightened and nervous; that Mr. Stout lunged at him and "the gun went off." He agreed Mr. Stout showed him into bedroom number one. At that point, appellant claimed that Wesley was also present and Mr. Stout, although shot in the head, was able to knock the guns from both appellant's hand and Wesley's hand. Appellant claimed that Wesley said "shoot him"; that appellant looked down and saw Wesley's black ARMI .25. Appellant stated, "I picked Dan's gun up and I fired and then at that time Mr. Stout fell on the floor, rolled off the bed onto the floor." Appellant admitted speaking with Wesley, but only to state he was fleeing. He claimed he went to the basement, backed the car out of the garage and was joined by Wesley. He said he was sorry for his acts.

The appellant lists his mitigating factor evidence as follows: During the mitigation phase of the proceedings, the

defendant presented fifteen witnesses and six exhibits. The witnesses who testified in behalf of the defendant, came from various backgrounds and were both male and female. Their ages ranged from twenty to sixty years of age. The evidence elicited form those individuals established the following facts concerning the defendant.

1. The defendant came from a close family and resided at home with his mother, step-father, and younger sister.

2. John went only until the ninth grade of high school, and during his early years of school, he engaged in the normal activities of a child of his age.

3. Two of John's grade school teachers testified that, while he was not academically inclined, he tried very hard and worked up to his ability, which was consistent with his I.Q. of 78 to 87.

4. The teachers both testified that John's interaction with others was good and that he was not a problem student.

5. One of the teachers, Annette Walls, had experience for seven years teaching juvenile delinquents, and she testified concerning John's positive attitude and that he was not a discipline problem. Both teachers agree upon John's positive response when he was reprimanded and the fact that he acknowledged when he was wrong.

6. Several factors were heard repeatedly from most of the witnesses who testified. One of these factors was that John was not possessed of a temper and none of them had ever seen an outburst of a temper from John.

7. Another factor to be considered in the context of this offense again brought a consensus of opinion and that was the lack of leadership qualities that John possessed. Without

exception, the witnesses agreed that John was not a leader and was one of those individuals who would follow along with others.

8. Evidence was elicited that John never engaged in fighting or violent acts and was an individual who had the utmost respect for women.

9. John was an individual who was always working and when he did work, he did more than was expected of him.

10. John was an individual who went out of his way to help others and was one of those individuals who got along with everyone. John was trusted to watch the infant children of friends and relatives, and extended help on numerous occasions to an elderly friend who suffered from a heart condition.

11. John was a compassionate individual which was evidenced by the account of one witness concerning John's accompanying the father of a friend who had been killed in a motorcycle accident. His presence on that occasion was to offer moral support to the family.

12. John did not like guns and never possessed them and on the one occasion that he did go deer hunting with friends, he expressed his distastes for it.

13. One witness testified that the co-defendant, Dan Wesley, was the leader of the two.

14. Witnesses who were closest to John testified that they had never seen anything in his history and background which would indicate that John had a tendency toward the acts to which he had entered a plea of guilty.

The witnesses from whom this testimony was elicited included his mother, one sister, two teachers, and nine friends. The term "friends" does not consist of individuals close to the age of the defendant but includes a number of older adults. Also offered during the mitigation phase were exhibits consisting of the indictment against the co-defendant, Clyde Daniel Wesley, the Bill of Information and plea proceedings of Norman Edmonds, school records of John Stumpf, a social history of John Stumpf, and a summary of questionnaires completed by residents of the Cannonsburg, Pennsylvania, area. Also submitted were the original questionnaires upon which the summary was based. While the validity and relevancy of the questionnaires was placed in issue, the court did allow them to be submitted. The questionnaires were the result of more than sixty interviews with individuals from that community and were occasioned by the fact that the distance of Cannonsburg, Pennsylvania, resulted in the procedure being used.

In the original brief in direct appeal in Case No. 760, appellant assigns ten errors in form:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN FINDING THAT THE ONE AGGRAVATING CIRCUMSTANCE OUTWEIGHED THE MITIGATING FACTORS PRESENTED BY THE DEFENDANT. THE PROCEDURE FOLLOWED BY THE COURT WAS CONTRARY TO LAW. THE FINDING WAS CONTRARY TO THE EVIDENCE AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 2.

THE DEATH SENTENCE IS DISPROPORTIONATE TO THAT IMPOSED IN SIMILAR CASES, AND THEREFORE VIOLATIVE OF THE STATE AND FEDERAL CONSTITUTIONS.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED IN REQUIRING EVIDENCE OFFERED IN MITIGATION TO BE PROVED BY A PREPONDERANCE. SUCH A REQUIREMENT DEPRIVED THE DEFENDANT OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED IN ITS JUDGMENT AND SENTENCE BY FAILING TO COMPLY WITH SECTION 2929.03(F) OF THE OHIO REVISED CODE.

ASSIGNMENT OF ERROR NO. 5

UPON AN INDEPENDENT WEIGHING, IT IS APPARENT THAT THE SINGLE AGGRAVATING CIRCUMSTANCE THE DEFENDANT WAS FOUND GUILTY OF COMMITTING DOES NOT OUTWEIGH THE MITIGATING FACTORS BEYOND A REASONABLE DOUBT, AND THEREFORE, THE DEATH SENTENCE CANNOT BE AFFIRMED, PURSUANT TO REVISED CODE SECTION 2929.05(A).

ASSIGNMENT OF ERROR NO. 6

DEATH IS NOT THE APPROPRIATE SENTENCE IN THIS CASE. THEREFORE, PURSUANT TO REVISED CODE SECTION 2929.05(A), AND REVISED CODE SECTION 2929.06, AND THE STATE AND FEDERAL CONSTITUTIONS, THIS DEATH SENTENCE MUST BE VACATED AND THE CASE REMANDED FOR A RE-SENTENCING HEARING TO DETERMINE WHICH LIFE TERM WILL BE IMPOSED.

ASSIGNMENT OF ERROR NO. 7

THE DEATH PENALTY IMPOSED UPON THE DEFENDANT, AND THE STATUTES AUTHORIZING IT, IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS TWO, NINE, TEN AND SIXTEEN, ARTICLE I OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. 8

OHIO REVISED CODE, SECTIONS 2929.03 AND 2929.04, AS APPLIED TO THE DEFENDANT, VIOLATE UNITED STATES CONSTITUTION, AMENDMENT VIII AND OHIO CONSTITUTION ARTICLE I, SECTION 9, PROHIBITION AGAINST THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT.

ASSIGNMENT OF ERROR NO. 9

THE DEATH PENALTY IMPOSED UPON THIS DEFENDANT UNDER SECTIONS 2929.02, 2929.022, 2929.03 AND 2929.04 OF THE REVISED CODE OF OHIO VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT PROVISIONS AND DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS BECAUSE THE AGGRAVATING CIRCUMSTANCE SET FORTH IN SECTION 2929.04(A) IS OVERBROAD AND VAGUE.

ASSIGNMENT OF ERROR NO. 10

THE MITIGATING CIRCUMSTANCES IN SECTION 2929.04(B) OF THE REVISED CODE OF OHIO ARE IMPERMISSIBLY VAGUE.

By leave of court a supplemental assignment of error was filed alleging abuse of discretion in the trial court's failure to allow withdrawal of the plea of guilty and to vacate the sentence.

The matters relating to the Wesley trial and jury mercy verdict for Wesley are also "feathered into" the second assigned error in the original brief. It also challenges the trial court's capacity to adjudicate those motions to withdraw guilty plea and vacate judgment upon the ground that one member of the three judge panel died after entry of judgment of death sentence and only the remaining two acted upon the motions.

The separate appeal Case No. 793 reasserts essentially the same assignment of error in this form:

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SET ASIDE PLEA OF GUILTY AND IN THE ALTERNATIVE TO CONDUCT A NEW SENTENCING HEARING. THE COURT LACKED JURISDICTION IN DETERMINING THE DEFENDANT'S MOTION.

We overrule all assigned errors for the reasons hereafter set forth in our serial considerations thereof.

1

We find no error or law in the trial court's handling of the comparison of the aggravating circumstances and the weighing of the mitigating factors against them.

The trial court filed a detailed statement of its reasons why the former outweighed the latter. The mere fact that a mitigating factor exists is not conclusive. What weight shall be given it is for the trier of fact even where the the fact of its existence is undisputed.

By appellant's guilty plea he admitted he was a principal offender. His plea to the specification effectively admitted that he killed the victim to silence her as a witness to the robbery, so as to escape detention and punishment. As a matter of law the intentional killing of a witness is entitled to great weight in a court of justice. Certainly no legal error in respect thereto exists relative to the weight assigned it on this record.

2

It is an undisputed fact that the death sentence for appellant is not the same as the mercy verdict for separately

tried Clyde Wesley. On the law side we reject the claim that this precludes the execution of Stumpf. The record contains facts justifying the death penalty for Stumpf and authorizing the conclusion that mercy for Wesley was not by the prosecutor's consent but an aberration of the jury that tried Wesley.

3

There is no error in placing the burden of persuasion upon the defendant as to mitigating factors. *State v. Jenkins* (1984), 15 Ohio St.3d 164 at 171.

4

This is a repeat of the first assigned error. The weight to be assigned to mitigating factors is for the trier of fact as is the relative weight to be assigned the aggravating circumstance. It is difficult to imagine what could, as a matter of law, outweigh as an aggravating circumstance in a court of justice the assassination of a witness to a crime.

5

This assignment of error fuses the law call with our independent duty to review and independently weigh all the facts and other evidence. R.C. 2929.05.

There were two aggravating circumstances. The first was essentially the assassination of a witness to escape detection and punishment and the second that he was armed with a firearm.

It is our independent judgment that the intentional killing of a witness is an aggravating circumstance we which we elect to assign the greatest possible weight because of the relationship it bears to the to the preservation of liberty under

law and that is our reason why, beyond a reasonable doubt, it outweighs all fourteen of the appellant's enumerated mitigating factors, including therein that Wesley later received a mercy verdict.

6

This assigned error actually addressed the law side of whether the trial court properly conducted its "weighing task" and filed the essential statement of reasons. It did. the document is lengthy, detailed and carefully handled. We find no error therein.

7, 8, 9, and 10

The seventh, eighth, ninth and tenth assignments of error are the obligatory multifacted attack upon the constitutionality of the death penalty generally and the Ohio Statutes particularly. They are each overruled upon the authority of *State v. Jenkins* (1984), 15 Ohio St.3d 164, and *State v. Maurer* (1984), 15 Ohio St.3d 242.

11

The separate assignment of error going to the motion to withdraw the guilty plea and vacate the conviction are both based upon the fact that appellant's cohort Wesley bragged (perhaps exaggeratedly, perhaps not) about his direct detailed participation in the slaying of Mary Jane Stout and the subsequent separate trial failure of the state to get a death verdict from Wesley's jury. We are compelled to characterize this as nothing more than an underserved lucky "bounce of the ball" for Wesley. The proposition that this aberration automatically precludes the death penalty for Stumpf is one to which we do not subscribe. The evidence before us shows the kind of crime for which the death penalty is manifestly appropriate. If Wesley deserved mercy upon the facts of his

case, that was for the jury. Mercy for Wesley deserved or undeserved is not, in our opinion, conclusive upon the trial court or us as a matter of law or upon as de novo in this case under R.C. 2929.05.

Moving now to the fact of the death of one member of the Common Pleas panel post judgment, R.C. 2945.06 plainly provides for a majority of the panel to decide questions of law.

As to the question of the motion to withdraw the plea, we find no evidentiary basis for relieving the accused of his plea. Nothing that qualifies as newly discovered evidence exists in this record.

We are not disturbed that the state tried Clyde Wesley as a principal executioner of the potential witness Mary Jane Stout after it had already secured a death penalty against Stumpf for the same intentional killing. The evidence beyond reasonable doubt shows Stumpf was at least one of her principal slayers.

The entire fallacy of appellant's position as we see it is that it depends upon the proposition that the law limits to one the number of people who may directly factually participate in a slaying. If twenty persons on a side intentionally and fatally "tug of war" as under another person is only one of them exposed to the hazard of a death penalty?

In our opinion, the evidence in this case shows Stumpf directly and personally participated in the actual slaying. The fact that another participant was spared the death penalty does not, in our opinion, preclude the death penalty as to him.

Stretched to its logical conclusion, appellant's concept means that if one person gets mercy for a horrible crime, thereafter the death penalty is precluded for all others who

commit the same kind of crime. In other words, one mercy verdict in any one county and the entire death penalty statute is effectively repealed. Stated otherwise, "If you lose one, you have lost them all."

This crime is worse than that in *State v. Williams* (1986), 23 Ohio St.3d 16, where the death penalty was affirmed by the Ohio Supreme Court March 26, 1986.

FINDINGS

Having complied with App.R. 12 respecting the assignments of error, we move to a discharge of our responsibility under R.C. 2929.05. In that connection, we make the following certifications:

We have reviewed and independently weighed all of the facts and other evidence disclosed in the record in this case, and we have considered the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case and whether the sentence of death is appropriate. In so doing, we have considered whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. We conclude beyond a reasonable doubt that the death sentence is appropriate in this case and that is neither excessive nor disproportionate to the penalty imposed in similar cases. We have also reviewed all the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances. First, that he pled guilty to the charge that he killed Mary Jane Stout purposely and for the purpose of escaping detection, apprehension, trial or punishment for other offenses committed by him, to wit, aggravated robbery and attempted aggravated murder and also to the separate specification that while so doing he had a firearm on or about his person or under his control while committing that offense.

We conclude that the sentencing court properly weighed the aggravating circumstances that the offender was found guilty upon his plea of guilty of committing and the mitigating factors that the accused proved.

In addition to our traditional responsibility to review the judgments and orders of the Guernsey County Common Pleas Court, we are required by R.C. 2929.05 independently to examine two additional questions:

> (1) Do the fact and evidence in the record satisfy us that the aggravating circumstances of which Stumpf was found guilty outweigh the mitigating factors? and,
>
> (2) Is the sentence of death appropriate?

We must be independently persuaded that the answer to both of these questions is "yes" to affirm the death sentence. R.C. 2929.05(A).

The appropriateness of the death penalty has both a constitutional and statutory dimension.

Constitutional Dimension. The Eighth and Fourteenth Amendments to the U.S. Constitution, as interpreted by the U.S. Supreme Court, require us to examine whether, upon the facts and circumstances of this case, the imposition of the death penalty would amount to "cruel and unusual punishment." The death penalty is cruel and unusual if "excessive," *Gregg v. Georgia* (1976), 428 U.S. 153, 173, or is arbitrarily or capriciously imposed, *Furman v. Georgia* (1972), 408 U.S. 238 (per curiam). See *Gregg*, supra, at 189 ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that

discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.")

Consideration of what penalties have been imposed in similar cases—comparative proportionality review—is not required by the Constitution. *Pulley v. Harris* (1984), 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29. See, also, *Shaw v. Martin*, (4th Cir. 1984), 733 F.2d 304 (although comparative proportionality review may be a safeguard against arbitrarily imposed death sentence, it is not constitutionally required).

Statutory Dimension. As pointed out by Judge Wise in his dissent, Ohio has selected, notwithstanding Pulley, to make proportionality review an indispensable ingredient in the process of determining whether the death sentence is appropriate.

> In determining whether the sentence of death is appropriate, the court of appeal and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.
>
> 2929.05(A).

Our proportionality review necessarily draws a new factual ingredient into this particular case. A co-defendant, Wesley, was tried and convicted as a principal in the same crime after sentence was pronounced by the common pleas court in the Stumpf case. Wesley has been since sentenced to life imprisonment. The impact proportionality can have upon Eighth and Fourteenth Amendment questions is well pointed out in *Enmund v. Florida* (1982), 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140. In *Enmund*, the defendant and a co-defendant were found guilty of the murder and robbery of two elderly persons at their farmhouse. They were sentenced to death. Enmund, convicted as a principal, remained in the car, waiting to help those who went into the farmhouse and killed

in their escape. The Court concluded that the Eighth and Fourteenth Amendments were violated by the imposition of the death penalty on the defendant, who aided and abetted a felony in the course of which a murder was committed by others, but who did not himself kill, attempt to kill, intend to kill, or contemplate that life would be taken.

It is within this framework that we undertake our independent examination of the facts and other evidence in this case and address the two critical questions:

> DO THE FACTS AND EVIDENCE IN THE RECORD SATISFY US THAT THE AGGRAVATING CIRCUMSTANCES OF WHICH DEFENDANT WAS FOUND GUILTY OUTWEIGH THE MITIGATING FACTORS?

We independently find that the aggravating circumstances to which the offender plead guilty are that he killed Mary Jane Stout purposely for the purpose of escaping apprehension and punishment as above stated and also while armed with a firearm.

We further find, after taking into consideration the nature and circumstances of the offense, the history, the character and background of the offender, and all of the factors specified in R.C. 2929.04(B), that the aggravating circumstances beyond a reasonable doubt outweigh all the mitigating factors in this case. In this connection, we state that we have considered the fact that Wesley received mercy, plus all fourteen of the mitigating factors claimed by the accused, including but not limited to: (1) evidence of character; (2) use of alcohol and drugs; (3) employment history; (4) emotional stability; (5) family relationships; (6) educational background and native intelligence (see defendant's mitigation Exhibit "3"); (7) unverified and unattested questionnaires on John David Stumpf (see defendant's mitigation Exhibit "6"); (8)

summary results of questionnaires (see defendant's mitigation Exhibit "5"); and (9) leadership qualities. We are aware that the offender was 23 years of age and has a low I.Q. and no significant criminal record.

Moving now to our statutory duty to state the reasons why we find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, we state that the aggravating circumstance of intentionally killing an innocent, stranger witness-victim of crime so as to prevent detection and punishment is a direct assault of great magnitude and weight upon the integrity of the justice system and the foundations of liberty. The weight of that aggravating circumstance, coupled with the use of a firearm, outweighs all of the mitigating factors shown in this case, including but not limited to a showing that the offender is 23 years of age, has a low I.Q., is without a significant prior criminal history, and is remorseful. Those are our reasons.

Upon the question of the impact of the fact that a fellow participant in the guilty conduct subsequently received a mercy verdict in a separate trial to a jury, it is our opinion that this does not as a matter of law preclude the death penalty for Stumpf.

IS THE SENTENCE OF DEATH APPROPRIATE?

This was an awful, vicious murder. The victim and her husband were innocent, peaceful, even helpful, strangers. They were treated inhumanely and with utter disregard of their right to dignity, not to mention the right to live peaceably in their own home. They invited no intrusion into their privacy. They courted no assault. They suffered savage assaults.

We agree with the dissent that Stumpf and Wesley "both deserve the electric chair."

What, then, is the impact of the fact—injected into this case for the first time on appeal—that the offender, Wesley, was also found guilty, after trial by jury, of the same offense, and was, in the sentencing hearing, given a life sentence?

We find the evidence supports the conclusion that it was Stumpf, not Wesley, who pulled the trigger that propelled the four bullets into the body of the victim.

Having so found, we conclude that the death sentence is neither excessive, disproportionate, nor cruel and unusual. Stumpf did kill within the purview of *Enmund, supra*.

Under these findings and this state of the case, we find no disproportion in the death sentence here as contradistinguished from the life sentence in the case of Wesley.

However, it is not essential that we find Stumpf to be the killer in fact to conclude that the death sentence as to him is not disproportionate. The statutory concept of "proportionality" goes generally to the question whether this is the sort of crime for which the death penalty is appropriate; it does not mean specifically that no joint principal actor may be executed unless all are. Stated conversely, if Wesley showed his jury grounds for mercy for him, that distinguished from Stumpf.

Many of the factors in Wesley's case bearing upon mitigation and appropriateness of the death penalty as to him, are necessarily irrelevant as to Stumpf. (Thus, for example, it is conceivable that two offenders could together hold the gun and jointly pull the trigger. For one life sentence might be appropriate and not disproportionate; that is, the mitigating factors for the former outweigh the aggravating circumstances; or his age or health might make death an

inappropriate sentence.) See *United States v. Barnes* (2d Cir. 1979), 604 F.2d 121, *cert. denied* (1980), 446 U.S. 907 (however desirable some standards may be to avoid gross disparities in sentencing, because of the many variables attached to each case, it will always remain the fact that each situation requires its own special treatment); *Phillips v. Gathright* (W.D. Va. 1979), 468 F. Supp. 1211, 1212, *aff'd without opinion* (1979), 603 F.2d 219 (punishment is not arbitrary simply because others escape punishment for the same, equal or even worse behavior).

We find no decisions by the United States Supreme Court dealing with the proportionality issue as presented in the instant case, i.e., comparing the sentences of co-defendants for the same crime arising from the same activity. The Court, however, has decided recently to review two capital punishment cases where this kind of proportionality analysis may be required. See *Tison v. Arizona* (1984), 142 Ariz. 446, 690 P.2d 747 (*en banc*); 142 Ariz. 454, 690 P.2d 755 (*en banc*), *cert. granted* (1986), 89 L.Ed.2d 299 (whether the death penalty, for a murder committed in the course of a prison escape, may be imposed on a person who participated in the escape, but who did not kill or attempt to kill anyone).

For the foregoing reasons, all the assigned errors, eleven in number, in the direct appeal in Case No. 760 are overruled and the assignment of error in all three of its aspects in Case No. 793, relating to the motion to withdraw the guilty plea, are overruled, the judgment of the Court of Common Pleas of Guernsey County is affirmed, and this cause is remanded to that court for execution of sentence.

JOURNAL ENTRY OF JUDGMENT

This document is an announcement of decision. See Ohio App.R. 26.

This document is the judgment entry may pursuant to the third sentence of Ohio App.R. 22(B).

CLERK TO REFILE

Ten days from the date hereof this document will be file-stamped to indicate journalization, at which time it will become the journal entry of judgment and order of the court and the time period for review shall begin to run. App. R. 22(E).

MANDATE

It is ordered that a special mandate issue out of this court directing the Court of Common Pleas to carry this judgment into execution.

CERTIFY COPY TO SUPREME COURT

A certified copy of this document shall constitute the separate opinion as to the findings of the court in this case within the meaning of R.C. 2929.05(A) and the clerk of this court shall immediately make and file such certified copy with the clerk of the Supreme Court of Ohio. See the last paragraph of R.C. 2929.05(A).

CONCUR BY: WISE (In Part)

DISSENT BY: WISE (In Part)

DISSENT: WISE, J. CONCURRING IN PART AND DISSENTING IN PART

I concur with the majority's opinion in overruling all assigned errors as to the appellant's direct appeal. However, R.C. 2929.05 requires each member of this court to conduct a de novo determination as to "whether the sentence of death is appropriate." If that were the sum total of the statutory language as to the duty imposed upon us, I would certainly joint the majority in holding that the death penalty in-this case is appropriate. I do so believe. However, the Ohio statute mandates further that:

> In determining whether the sentence of death is appropriate, the court of appeals . . . shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. (Emphasis added.)

I view this language as adding an additional mandatory burden upon each judge not only to determine whether the death penalty is appropriate under the facts of the case, but further whether it is appropriate in light of the sentence given, at least, to other participants in the commission of the same crime. I am fully aware that under *Pulley v. Harris* (1984), 465 U.S. 37, 79 L.Ed.2d 29, the United States Constitution does not require a state appellate court, before affirming a death sentence, to compare the sentence in the case before it with the sentence imposed in similar cases simply because the defendant requests it. However, under R.C. 2929.05, the clear mandate of the legislature is that we individually shall do so. The case at bar clearly poses the issue of sentence "in similar cases." Wesley and appellant were both found guilty of the same crimes. The fact of who pulled the trigger in the case at bar does not make the death sentence any more or less appropriate. They both deserve the death penalty. The cases of appellant and Wesley are similar in every aspect except that the appellant came forward, did not fight extradition, made statements implicating himself, and pled guilty; Wesley fled,

fought extradition and pled not guilty and stood trial to a jury. Appellant received the death penalty; Wesley received a mercy sentence. I cannot sanction the electric chair for the appellant since it would be excessive and disproportionate to the penalty imposed in the similar case of Wesley. My decision in this case is compelled by statutory enactment and not personal choice.

I therefore respectfully dissent from the majority holding as to the penalty to be imposed on appellant.

APPENDIX K

IN THE COURT OF COMMON PLEAS
OF GUERNSEY COUNTY, OHIO

STATE OF OHIO

Plaintiff CASE NO. 9684

-vs-

JOHN DAVID STUMPF JUDGMENT ENTRY

Defendant

This matter came on for hearing in accordance with Section 2945.06 of The Revised Code of Ohio, the Defendant heretofore having waived a trial by jury and having requested a trial to a panel of three judges. Thereafter, the Defendant entered a plea of guilty to Count One of the Indictment and Specification One as amended to Count One and Specification Four, to Count One. The Defendant further entered a plea of guilty to Count Two of the Indictment and the Specification to Count Two.

The Court in accordance with Section 2945.06 of the Revised Code of Ohio heard the testimony of the witnesses and determines that the Defendant is guilty beyond a reasonable doubt as charged in Count One of the Indictment and is guilty beyond a reasonable doubt of Specification One as amended to Count One and Specification Four to Count One.

The Court further determines that the Defendant is guilty beyond a reasonable doubt as charged in Count Two of

the Indictment and guilty beyond a reasonable doubt of the Specification to Count Two as set forth in the Indictment.

/s/JOHN E. HENDERSON, JUDGE
/s/RAYMOND C. RICE, JUDGE
/s/J. WAREN BETTIS, JUDGE

APPENDIX L

IN THE COURT OF COMMON PLEAS
OF GUERNSEY COUNTY, OHIO

STATE OF OHIO,	:	
	:	
Plaintiff,	:	CASE NO. 9684
	:	
-vs-	:	SEPARATE OPINION
	:	REQUIRED BY SECTION
JOHN DAVID STUMPF,	:	2929.03, THE REVISED
	:	CODE OF OHIO
Defendant.	:	

Pursuant to Section 2929.03 F of the Revised Code of Ohio, the Court being a panel of three judges does hereby state in a Separate Opinion as follows:

A. EXISTENCE OF ANY MITIGATING FACTORS SET FORTH IN DIVISION B OF SECTION 2929.04.

The Court has considered in accordance with Revised Code of Ohio, Section 2929.04 the following mitigating factors:

1. The nature and circumstances of the offense.

2. The history, character and background of the offender. (See Defendants Mitigation Exhibit No. 4)

We find that the Defendant has established by a preponderance of the evidence the following mitigating factors:

1. The youth of the offender - age 23.

2. That although the Defendant had been found guilty of certain offenses in his home community, the Defendant lacked significant history of prior criminal conviction and delinquency adjudications.

We further find that the Defendant has not established by a preponderance of the evidence Mitigating Factors 1, 2, 3 and 6 as set forth in 2929.04 B.

B. EXISTENCE OF ANY OTHER MITIGATING FACTORS.

The Defendant presented the following factors which the Court has considered:

1. Evidence of character.

2. Use of alcohol and drugs.

3. Employment history.

4. Emotional stability.

5. Family relationships.

6. Educational background and native intelligence. (See Defendant's Mitigation Exhibit No. 3)

7. Unverified and unattested questionnaires on John David Stumpf. (See Defendant's Mitigation Exhibit No. 6). The alleged preparer's name appears in response to Question No. 30 with no indication it is or is intended as a signature. The questionnaries were prepared by person or persons unknown.

8. Summary results of questionnaires. (See Defendant's Mitigation. Exhibit No. 5)

9. Leadership qualities.

Factors 1 through 9 were not established as mitigating factors by a preponderance of the evidence.

C. AGGRAVATING CIRCUMSTANCES THE DEFENDANT WAS FOUND GUILTY OF COMMITTING.

The offense was committed for the purpose of escaping detection, apprehension, trial or punishment for other offenses committed by the Defendant, to-wit: Aggravated Robbery and Attempted Aggravated Murder.

D. REASONS WHY THE AGGRAVATING CIRCUMSTANCES THE OFFENDER WAS FOUND GUILTY OF COMMITTING WERE SUFFICIENT TO OUTWEIGH THE MITIGATING FACTORS:

1. The Court finds beyond a reasonable doubt that the Defendant was the principal offender in count one of the indictment.

2. The methodical manner in which the Defendant and his companion entered the house of the victims and assumed control of the victims. Examples:

   a. Wiping of fingerprints from the telephone.

   b. The dialogue of the Defendant with his companion. (See attached Transcript A)

c. The initiative taken by the Defendant in the course of that dialogue leading up to and directing the victims into the bedroom.

d. Continual holding both victims at gunpoint by the Defendant.

e. The Defendant shooting the male victim at close range between the eyes.

f. The Defendant firing a second shot into the head of the male victim.

g. The Defendant and his companion engaging in dialogue in the proximity of the male victim followed by four shots, the bullets of which were found in the head and body of Mary Jane Stout.

3. Failure of the Defendant and his companion to render assistance to the victims.

4. Defendant and his companion fleeing immediately from the scene with the victims' automobile and personal property including firearms and ammunition.

5. The Defendant actively participated in the sale of guns stolen from the home of the victims.

6. The Course of conduct of the Defendant both before and after the commission of the offense in the travel through the country with a quantity of beer and guns.

7. The Defendant's companion firing a gun into a passing vehicle in route.

8. The Defendant made no effort to disassociate himself from his companions.

9. The direct evidence of a gang operation of robbery, assault and other crimes.

September 24, 1984 /s/JOHN E. HENDERSON, JUDGE
/s/RAYMOND C. RICE, JUDGE
/s/J. WARREN BETTIS, JUDGE

APPENDIX M

IN THE COURT OF COMMON PLEAS

GUERNSEY COUNTY, OHIO

STATE OF OHIO,	:	CASE NUMBER 9684
PLAINTIFF,	:	JUDGMENT ENTRY
v.	:	
JOHN DAVID STUMPF,	:	
DEFENDANT.	:	

This matter came on for trial upon regular assignment this 17th day of September, 1984, before a three judge panel consisting of the Honorable John E. Henderson of this Court, the Honorable J. Warren Bettis, Judge of the Court of Common Pleas, Columbiana County, Ohio, by assignment of the Ohio Supreme Court, and the Honorable Raymond Rice, Judge (retired) of the Court of Common Pleas, Tuscarawas County, Ohio, by assignment of the Ohio Supreme Court, with the Honorable John E. Henderson presiding, the Defendant having heretofore on the 23rd day of August, 1984, properly waived in writing and in open court with the advice and assistance of counsel his right to trial by jury in this cause and his election to be tried by a three-judge panel.

The Defendant appeared in open court represented by his court-appointed counsel, Attorneys Lewis M. Tingle and Craig M. Stephens, and the State of Ohio represented by the Prosecuting Attorney, James R. Scott, and Assistant Prosecuting Attorney, C. Keith Plummer.

Whereupon, the Prosecuting Attorney informed the Court that a negotiated plea had been concluded, subject to the approval of the court, and stated in open court and on the record the underlying agreement regarding the plea bargain, the same being subject to the provisions of Rule 11(C)(3), Ohio Rules of Criminal Procedure and Ohio Revised Code, Section 2945.06, with respect to the charge contained in the First count in the Indictment, to wit: the offense of "AGGRAVATED MURDER" with specifications of aggravating circumstances.

Counsel for the Defendant, and the Defendant personally, upon inquiry by the Court confirmed that the Prosecuting Attorney had fully, accurately and correctly stated the terms of the plea bargain.

In accord with the terms of the plea bargain, and upon oral motion by the Prosecuting Attorney pursuant to the provisions of Rule 7(D), Ohio Rules of Criminal Procedure and the provisions of Ohio Revised Code, Section 2941.30, leave was granted for the Prosecuting Attorney to amend Specification One to the First Count set forth in the Indictment in this cause by substituting the words "other offenses" for the words "another offense" and by adding at the end of said Specification One, the language "and 'ATTEMPTED AGGRAVATED MURDER'", and the Prosecuting Attorney thereupon amended said Specification One to the First Count accordingly, by interlineation, all without objection by the Defendant.

Upon inquiry by the Court, counsel for the Defendant informed the Court that they have fully investigated the facts and law in this case and have informed the Defendant of all defenses available to him, and have further informed the Defendant of the nature of the offense of "AGGRAVATED MURDER" as charged in the First Count, together with the Specification One, as amended, and Specification Four to said

First Count, and the nature of the offense of "ATTEMPTED AGGRAVATED MURDER" as charged in the Second Count, together with the Specification to said Second Count, and the penalties for said offenses, and that they had further informed the Defendant of all of his constitutional rights under both the Ohio Constitution and the United States Constitution.

Whereupon, after being advised of his privilege against self-incrimination by the Court, the Defendant, personally, waived said privilege and was duly sworn and answered inquiries by the Court and the Court being satisfied therefrom that the Defendant has been fully advised of all of his constitutional rights, including the nature of the aforesaid offenses charged in the First Count and Second Count in the Indictment and the aforesaid Specifications to said counts, and the possible penalties thereunder, and that the Defendant is fully aware of the consequences of entering a plea of "GUILTY" to said First Count, including Specification One, as amended, and Specification Four to said First Count, and a plea of "GUILTY" to said Second Count and the Specification thereto, including such of his constitutional rights as will be waived by entering such pleas of "GUILTY" and that the proposed pleas of "GUILTY" thereto is voluntarily, knowledgeably and intelligently tendered by the Defendant without any threats or promises having been made to the Defendant to induce such pleas of "GUILTY" other than the terms of the plea bargain as entered into the record and affirmatively acknowledged by the Defendant upon the record. Whereupon, the Defendant, personally, withdrew his former plea of "NOT GUILTY" and entered a plea of "GUILTY" to the offense of "AGGRAVATED MURDER" in violation of Ohio Revised Code, Section 2903.01(B) as charged in the First Count of the Indictment and withdrew his former plea of "NOT GUILTY" and entered pleas of "GUILTY" to Specification One, as amended, and Specification Four, to said First Count, and the Defendant

further withdrew his former plea of "NOT GUILTY" and entered a plea of "GUILTY" to the offense of "ATTEMPTED AGGRAVATED MURDER" in violation of Ohio Revised Code, Section 2923,02(A) (Felony in the First Degree) and withdrew his former plea of "NOT GUILTY" and entered a plea of "GUILTY" to the Specification to said Second Count.

The Court finds that the aforesaid pleas of "GUILTY" by the Defendant were made freely, voluntarily and understandingly with full knowledge of the nature of the accusations against him and the consequence of entering said pleas and without any threats, undue influence, compulsion, coercion, promises of leniency or other promises of any kind except as set forth in the aforesaid plea bargain entered into the record and affirmatively acknowledged on the record by the Defendant.

It is, accordingly, ORDERED AND ADJUDGED that the aforesaid plea of "GUILTY" be and hereby are accepted and made a part of the record in this cause this 17th day of September, 1984, and it is further

ORDERED AND ADJUDGED, that an evidentiary hearing be had in this cause pursuant to Ohio Revised Code, Section 2945.06, and pursuant to Rule 11(C)(3), Ohio Rules of Criminal Procedure, commencing at 9:00 o'clock A.M. on the 18th day of September, 1984, with respect to the offense of "AGGRAVATED MURDER" as set forth in the First Count in the Indictment and with respect to Specification One, as amended, and Specification Four to said First Count, and it is further

ORDERED AND ADJUDGED, that the matter of the adjudication of guilt and the imposition of sentence with respect to the offense of "ATTEMPTED AGGRAVATED MURDER" as set forth in the Second Count In the Indictment and the Specification to said Second Count be and hereby are

deferred pending completion of the aforesaid evidentiary hearing and further proceedings according to law with respect to said First Count and Specification One, as amended, and Specification Four to said First Count.

/s/JOHN E HENDERSON, JUDGE
/s/RAYMOND C. RICE, JUDGE
/s/J. WARREN BETTIS, JUDGE

APPROVED:
/s/JAMES R. SCOTT, PROSECUTING ATTORNEY
COUNSEL FOR PLAINTIFF
/s/LEWIS M. TINGLE
CO-COUNSEL FOR DEFENDANT
/s/CRAIG M. STEPHENS
CO-COUNSEL FOR DEFENDANT

APPENDIX N

Court of Appeals of Ohio
Fifth Appellate District
Guernsey County

Case No. 89-CA-50

STATE OF OHIO, Plaintiff-Appellee,
v.
JOHN DAVID STUMPF, Defendant-Appellant,

Appellant from Common Pleas Court, Case No. 9684.

July 23, 1990

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Guernsey County, Ohio, is affirmed.

JUDGES: Hon. Norman J. Putman, P.J., Hon. Irene B. Smart, J., Hon. W. Scott Gwin, J., concur.

COUNSEL: For Plaintiff-Appellee, C. KEITH PLUMMER, PROSECUTING ATTORNEY, Cambridge, Ohio. For Defendant-Appellant, DAVID L. DOUGHTEN, Cleveland, Ohio.

OPINION BY: GWIN

OPINION

Defendant-appellant, John David Stumpf (appellant), appeals from the judgment of the Court of Common Pleas of Guernsey County granting summary judgment in favor of the

State of Ohio thereby dismissing appellant's petition for post-conviction relief under R.C. 2953.21, which judgment is attached as an Appendix to this opinion. Appellant now seeks our review and assigns the following as error:

I. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL RENDERED THE APPELLANT'S WAIVER OF A JURY TRIAL INVALID IN CONTRAVENTION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

II. THE TRIAL COURT ERRED IN FINDING THE APPELLANT'S PLEA OF GUILT TO BE A KNOWING AND VOLUNTARY WAIVER OF HIS RIGHT TO TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

III. THE TRIAL COURT ERRED IN FAILING TO FIND THAT DEFENSE COUNSEL IMPROPERLY INDUCED APPELLANT'S PLEA, AND THEREBY DEPRIVED THE APPELLANT OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS PROTECTED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

IV. THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE MITIGATION PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH

AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ART. I SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

V. THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VI. THE TRIAL COURT ERRED IN SUMMARILY DISMISSING APPELLANT STUMPF'S POST CONVICTION PETITION WITHOUT ACCORDING HIM AN EVIDENTIARY HEARING.

I

In his first assignment, appellant claims that his waiver of a jury trial is invalid because of ineffective assistance of counsel. The standard two-pronged test by which we are guided in the base sub judice for determining whether there has been ineffective assistance of counsel is:

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washington (1984), 466 U.S. 668, 687.

The above test is in substance the test for determining effective assistance of counsel under the Ohio Constitution. See *State v. Lytle* (1976), 48 Ohio St. 2d 391, 195, vacated in

part on other grounds (1978), 438 U.S. 910; *State v. Brooks* (1986), 25 Ohio St. 3d 144, 147; *State v. Post* (1987), 32 Ohio St. 3d 380, 388.

In *State v. Decker* (1986), 28 Ohio St. 3d 137, 140, the Ohio Supreme Court summarized certain relevant portions of the *Strickland*, supra, analysis as follows:

In *Strickland v. Washington* (1984), 466 U.S. 668, the United States Supreme Court articulated the duties of trial counsel. The court stated that " . . . counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. Accord *State v. Johnson* (1986), 24 Ohio St. 3d 87, 89. The court also observed that ". . . strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." *Strickland*, supra, at 690. And, importantly, the Strickland court recognized the "distorting effects of hindsight" and warned against second-guessing as to counsel's assistance after a conviction. *Id.* at 689. For these reasons, the court must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," and ". . . a court deciding an actual effectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct . . . ." *Id.* at 690.

Here, appellant's trial counsel advised appellant that he should waive a jury trial because a police officer had recently been shot in Guernsey County and that would prevent him from obtaining a fair and impartial jury. Appellant claims that trial counsel, midway through voir dire, advised appellant that the attitudes of the perspective jurors had hardened from the killing of the police officer. Appellant claims that this demonstrated a lack of competent counsel because the killing of the police officer was unrelated to the instant case, none of

the prospective jurors during voir dire mentioned the policeman's death, none of the attorneys questioned the perspective jurors on the killing, and appellant's counsel did not renew a request to change venue.

Upon reviewing appellant's trial counsel's advice at the time it was given and the evidence against appellant, we find that the advice that appellant waive a jury trial was a plausible and reasonable strategic decision.

As stated in *State v. Clayton* (1980), 62 Ohio St. 2d 45, 49:

> Counsel chose the strategy that proved ineffective but that the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client.

> We cannot say that appellant's trial counsel failed to make a reasonable strategic choice faced with the evidence against appellant and his reading of a jury's attitude during vior dire.

Accordingly, we overrule this first assignment.

II

In his second assignment, appellant claims that he did not make a knowing, intelligent and voluntary plea of guilty to aggravated murder with a capital specification because such plea was entered only after appellant's counsel assured appellant that he would not receive the death penalty. We overrule this assignment because the record before us indicates that appellant was well aware, before his plea was accepted, of the possibility that the death penalty could still be imposed if he pled guilty.

Accordingly, this assignment of error is hereby overruled.

III

In his third assignment, appellant claims that appellant's trial counsel improperly induced the appellant's plea of guilty by indicating that he would not receive the death penalty upon entering the plea and such constituted ineffective assistance of counsel. We disagree.

As discussed above, appellant was sufficiently apprised before entering his plea that such a plea still carried the possibility of the death penalty. Accordingly, appellant has failed to demonstrate that his counsel's advice prejudiced him under the *Strickland*, supra, test.

Therefore, we overrule this assignment of error.

IV

Through this assignment appellant asks us to look with hindsight at the mitigation phase of this capital trial and conclude that appellant's counsel's performance was inadequate by what he did and did not present.

As pointed out in the attached judgment entry, counsel for appellant presented at the mitigating phase "fifteen people who were friends, family members and former teachers, evidence in the form of exhibits regarding [appellant's] Co-defendants, Clyde Daniel Wesley and Norman Edmonds, [appellant's] school records, and questionnaires submitted by members of [appellant's] community." Furthermore, appellant's counsel was able to show that "the greater weight of the evidence was that the [appellant] had been well-liked and well-adjusted."

The three judge panel also found that the mitigating circumstances of a lack of significant criminal history, and appellant's youth existed. However, the panel found that the aggravated circumstances outweighed the mitigating factors beyond a reasonable doubt.

Upon review of the record, and the documentary evidence submitted by appellant in this petition, we cannot say that appellant lacked a competent counsel at the mitigating phase.

The underlying theme/argument prevalent throughout this assignment, is that appellant's counsel selected the wrong theory or tactic at the mitigation phase. We find that this underlying theme/argument unequivocally fails to meet the two-pronged test of *Strickland*, supra. Accordingly, we overrule this assignment of error.

V

In his fifth assignment, appellant claims that he was denied effective assistance of counsel at the appellate stage of the proceedings by failing to raise other "numerous instances of error."

Assuming arguendo the trial court incorrectly concluded that ineffective assistance of appellate counsel is not cognizable generally in proceedings under R.C. 2953.21 in any case, we affirm the trial court's judgment in this case for different reasons. Under *Strickland*, the critical question for ineffective assistance of appellate counsel in a capital case is whether a reviewing court with reasonable probability would have come to a different result had appellant's appellate counsel raised other instances of error.

Assuming arguendo appellant's appellate counsel did not raise these other "numerous instances of error" on the

original appeal, we find that there is not a reasonable probability of a different appellate result had these other instances of error been presented.

Accordingly, the fifth assignment of error is overruled.

VI

We overrule this final assignment for there were no specific allegations, if true, which would justify the conclusion of ineffective assistance of counsel nor was there submitted evidentiary documents containing sufficient operative facts to demonstrate ineffective assistance of counsel so to require an evidentiary hearing thereon.

In a petition for post-conviction relief, which asserts ineffective assistance of counsel, the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness.

State v. Jackson (1980), 64 Ohio St. 2d 107, syllabus.

Accordingly, we overrule this assignment of error.

For the foregoing reasons, we affirm the judgment of the Court of Common Pleas of Guernsey County.

APPENDIX O

THE SUPREME COURT OF OHIO

	:	1990 TERM
	:	
	:	To wit: December 26, 1990
State of Ohio,	:	
Appellee,	:	Case No. 90-1816
	:	
v.	:	ENTRY
	:	
John David Stumpf,	:	
Appellant.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Guernsey County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by David Doughten.

(Court of Appeals No. 89CA50)

/s/ THOMAS J. MOYER
Chief Justice

VOL 5 PG 3

APPENDIX P

SUPREME COURT OF THE UNITED STATES

No. 90-7495

STUMPF, JOHN D., PETITIONER

v.

OHIO

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF OHIO
GUERNSEY COUNTY

November 12, 1991

JUDGES: Rehnquist, White, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas.

OPINION

The petition for writ of certiorari is denied.

APPENDIX Q

COURT OF COMMON PLEAS
OF GUERNSEY COUNTY, OHIO

ENTRY

STATE OF OHIO,
PLAINTIFF,

CASE NO. 9684

v.

November 27, 1989

JOHN DAVID STUMPF,
DEFENDANT(S).

FINAL APPEALABLE ORDER

This matter comes on for hearing before the Court on Defendant's Petition for Post-Conviction Relief, pursuant to Revised Code § 2953.21 and the State of Ohio's Motion for Summary Judgment and Defendant's Motion for Summary Judgment.

The Court has carefully reviewed the Defendant's Petition for Post-Conviction Relief, the supporting Affidavits, the Court file and the attached partial transcripts. Based on this review, the Court, applying the standard of Civil Rule 56, finds that the State of Ohio's Motion for Summary judgment should be granted, and Defendant's Motions for Summary Judgment and Petition to Vacate or Set Aside Sentence should be denied.

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Petitioner was indicted on May 14, 1984 for a violation of R.C. § 2903.01, Aggravated Murder of Mary Jane Stout, with accompanying specifications pursuant to R.C. § 2929.04(A)(3), (A)(5) and (A)(7); a violation of R.C. § 2903.01, Attempted Aggravated Murder of Norman Stout; and for violations of R.C. § 2911.01 and 2913.02, Aggravated Robbery and Theft.

2. Petitioner waived his right to a jury trial and elected to be tried by a three-judge panel.

3. On September 17, 1984, the Petitioner entered a guilty plea to the aggravated murder of Mary Jane Stout, and the specification that her murder was done to escape detention, apprehension, trial or punishment for aggravated robbery, and the attempted aggravated murder of Norman Stout. Petitioner also entered a guilty plea to the attempted aggravated murder of Norman Stout.

4. After hearing evidence, the three-judge panel accepted petitioner's pleas and found the Petitioner guilty.

5. The Court conducted a sentencing hearing at which Petitioner presented evidence from fifteen people who were friends, family members and former teachers, and evidence in the form of exhibits regarding Petitioner's Co-defendants, Clyde Daniel Wesley and Norman Edmonds, Petitioner's school records, and questionnaires submitted by members of Petitioner's community.

6. The greater weight of the evidence was that the Petitioner had been well-liked and well-adjusted. Petitioner had the ability to read and write, and the Petitioner worked hard and helped other people.

7. The thrust of the Petitioner's evidence was that the Petitioner was a "follower" and Wesley was the "leader."

8. The three-judge panel found that the mitigating circumstance of a lack of a significant criminal history existed.

9. The three-judge panel also found that the mitigating circumstance of the Defendant's youth existed.

10. The panel found that the aggravated circumstances outweighed the mitigating factors beyond a reasonable doubt and imposed the death penalty.

11. Petitioner filed a Motion for a New Trial, which the Trial Court overruled.

12. Petitioner appealed both his conviction and the Court overruling his Motion for New Trial.

13. On May 22, 1986, the Guernsey County Court of Appeals affirmed the conviction and sentence and upheld the Court's overruling the Motion for New Trial in *State v. John David Stumpf*, Case No. CA-760, CA-793.

14. The Ohio Supreme Court affirmed on August 19, 1987 in *State v. Stumpf* (1987), 32 Ohio St.3d 95.

15. Petitioner filed a Petition to Vacate Judgment pursuant to R.C. § 2953.21, alleging he had received the ineffective assistance of counsel at trial and on appeal.

16. The partial transcripts and pleadings of Petitioner's trial show that the Petitioner's trial counsel represented Petitioner diligently.

17. The partial transcripts and the standards of law to be applied show that Petitioner's counsel adequately investigated the facts in preparation for the sentencing hearing.

18. Decisions about which Petitioner complains were reasonable trial tactics, including but not limited to waiving the jury, choosing not to introduce cumulative evidence, and asking questions of witnesses.

19. Petitioner's Affidavits are cumulative of evidence presented to and considered by the three-judge panel (Transcript of Proceedings, September 17, 18, 19, 20, 21 and 24, 545, 419-421, 445, 479).

20. The Ohio Supreme Court has held in *State v. Stumpf, supra*, that evidence was properly presented and considered at the sentencing hearing.

21. Petitioner's counsel had no meritorious grounds for the objections Petitioner claims they should have made.

22. The Trial Court advised the Petitioner that the death penalty was a possible penalty.

23. The facts show the Petitioner to be of low, but normal, intelligence, capable of understanding that the death penalty was a potential punishment; and the facts show that this potential punishment was read to the Defendant by Judge Henderson.

CONCLUSIONS OF LAW

1. Only constitutional violations alleged to have occurred at trial may be raised in a post-conviction petition pursuant to R.C. § 2953.21.

2. Allegations of ineffective assistance of appellate counsel may not be raised in a post-conviction petition.

3. A defendant is entitled to post-conviction relief only if there was such a denial or infringement of the rights of the Defendant as to render his conviction void or voidable under the Ohio or United States Constitutions.

4. Petitioner received effective assistance of counsel.

5. Petitioner's Petition for post-Conviction Relief does not state grounds for relief. The judgment is neither void nor voidable.

It is therefore the Order of this Court that Defendant's Motions for Summary Judgment and Petition to Vacate or Set Aside Sentence pursuant to R.C. § 2953.21 are denied. It is the Order of the Court that the State of Ohio's Motion for Summary Judgment is hereby granted.

/s/David A. Ellwood
Judge of the Common Pleas Court
of Guernsey County, Ohio

cc: Prosecuting Attorney
Patricia Walsh & David Doughten, 1040 Standard Blvd., 1370 Ontario St., Cleveland, Ohio 44113

APPENDIX R

September 17, 1984 Transcript of Hearing on
Stumpf's Entering Guilty Plea

PROCEEDINGS

(Whereupon, on September 17, 1984, at 1:49 o'clock p.m., the following proceedings were had before the Court.)

JUDGE HENDERSON: Before I begin with the matter at hand, I would like to introduce those who are with me at the bench. I did hear the Bailiff very plainly recite our names, but possibly there might be some doubt as to which one's which.

I am John E. Henderson of Guernsey County and I have been selected to preside in this case. And seated on my right is Judge Warren Bettis of Columbiana County, who has been assigned here by the Supreme Court as one of the three Judge Court. And to my left is Judge Rice--Judge Raymond Rice of Tuscarawas County, retired Judge. He is also a part of the three Judge panel.

The case that is before us at this time is the case of The State of Ohio versus John David Stumpf. The case bears a number, Case Number 9684.

At this time I note present in court at the counsel table the Prosecuting Attorney of Guernsey County, Mr. James Scott and the Assistant Prosecuting Attorney, Keith Plummer. They represent the State of Ohio in this case. And at the rear counsel table representing the defendant is Attorney Craig Stephens of Ravenna and Attorney Lewis Tingle of Cambridge, Ohio, and the defendant is present at the counsel table.

This is a case that has been brought to the attention of this Court by reason of an Indictment. An Indictment which was filed in this Court in the May term of 1984 and it consists of five counts and to the first count, which is that of Aggravated Murder, are specifications, first, second, third and fourth specifications. Count two is a count alleging Attempted Aggravated Murder and then is a specification to the second count. Count three is a count alleging Aggravated Robbery with a specification thereto and Count four is a specification of Grand Theft Motor Vehicle and Count five is a count alleging Grand Theft of a firearm. Those are the matters which are at the present time before this Court.

By way of explanation, this case was assigned for a jury trial and at the request and at the instance of the defendant with the advice and consent of his attorneys, the defendant did on the 23rd day of August, 1984, file with this Court a waiver as follows: I, John David Stumpf, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by duty and elect to be tried by a three judge panel in the Court to which the case may be pending. I fully understand that under the laws of this State I have a Constitutional right to a trial by jury.

Gentlemen of Counsel for the defense, I would ask at this time is the entire case and all counts before the Court for consideration at this time?

MR. TINGLE: Yes, Your Honor, it is.

JUDGE HENDERSON: Thank you. I have been advised that the State of Ohio has a motion at this time which it wishes to present. Mr. Scott?

MR. SCOTT: If it please the Court, as the Court is aware, we have been conferring with defense counsel for

some time this morning or earlier today prior to these proceedings. I believe we have arrived at a negotiated plea situation and I wish to recite for the record the understanding that I have, subject to the concurrence and agreement of defense counsel as to the matters agreed upon, with the Court's permission.

JUDGE HENDERSON: You may proceed.

MR. SCOTT: Your Honor, the first matter that would be dealt with or the State would ask leave of Court pursuant to Criminal Rule 7 (D) and Ohio Revised Code Section 2941.30 to amend by interlineation specification one to the first count of the Indictment in order that it may read as follows: The Grand Jurors further find and specify under Ohio Revised Code Section 2929.04 (A) (3) in compliance with Ohio Revised Code Section 2941.14 that the aforesaid offense being the offense charged in the first count, the Aggravated Murder, was comitted for the purpose of escaping detection, apprehension, trial or punishment for other offenses--the words, "other offenses" are the first change, committed by the above named John David Stumpf, to wit: Aggravated Robbery and then we're adding the language "and Attempted Aggravated Murder". If that amendment is granted, the defendant then would enter a plea of guilty to the first count contained in the Indictment, being the Aggravated Murder count and a plea of guilty to specification one to the first count as amended; would also enter a plea of guilty to the second count in the Indictment, being the offense of--excuse me, back up. As to the first count he would also enter a plea of guilty to specification four to the first count. So, he will be pleading to the first count, the amended specification one to the first count and specification four to the first count. With regard to the second count, being the Attempted Aggravated Murder, he would enter a plea of guilty to the Attempted Aggravated Murder and a plea of guilty to the specification to the second count. If the pleas of guilty to the two counts and

the specifications I've mentioned are accepted by the Court, the Court would then proceed under Criminal Rule 11 (C) (3) to determine if there is a factual basis for the plea of guilty to the Aggravated Murder charge and the existence of the aggravating circumstances and if the pleas are accepted the State would then ask leave to enter a nolle pros as to specifications two and three to the first count and also a nolle pros as to the third, fourth and fifth counts in the Indictment and including the specification to the third count.

That is my understanding of the arrangement that we are proposing to the Court at the present time.

JUDGE HENDERSON: Thank you, Mr. Scott. Before ruling on the motion or amendment of the Indictment, I would ask Counsel for the defense if they wish to comment upon the statement of the Prosecutor. Mr. Tingle?

MR. TINGLE: If the Court please, the statement made by the Prosecuting Attorney is an accurate statement based upon our discussions with him earlier today and one upon which we are ready to proceed at this time.

JUDGE HENDERSON: I'm going to ask the Counsel for the defendant to inform the defendant that I am going to ask one question of the defendant very shortly and that question is this: Do you, John David Stumpf, affirmatively acknowledge the agreement that has been stated by the Prosecutor and concurred in by the defendant's counsel? Having forewarned the defendant of the question that is to be asked, I'm going to ask that question now. Mr. Stumpf, do you affirmatively acknowledge this agreement?

MR. STEPHENS: Would you repeat the question for him, Your Honor?

JUDGE HENDERSON: Mr. Stumpf, do you affirmatively acknowledge the agreement that has been stated by the Prosecutor and concurred in by your attorneys?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Very well, you may he seated. Motion has been made by the Prosecutor---

MR. TINGLE: If the Court please, if I might interrupt. One matter that was not set forth in the statement of the Prosecuting Attorney, which I believe needs to be a matter of record at this time, the two specifications known as the gun specifications to count one, being specification number four and count two, the gun specification, I believe were to be stated by the Prosecuting Attorney to be the result of one transaction as part of our negotiations also.

JUDGE HENDERSON: Mr. Scott?

MR. SCOTT: That is correct, Your Honor, within the meaning of Section 2929.71 the fourth specification or gun specification to the first count and the gun specification being the only specification to the second count, are to be treated as part of the same because both offenses were committed as part of the same transaction within the meaning of 2929.71 of the Code.

JUDGE HENDERSON: Mr. Tingle, are you satisfied then?

MR. TINGLE: Yes, Your Honor.

JUDGE HENDERSON: I'm going to once again in the interest of caution, ask the defendant now that there has been a clarification of the agreement, I'm going to ask the

defendant again, Mr. Stumpf, do you affirmatively acknowledge this agreement between the Prosecuting Attorney and your attorneys?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: There has been a motion made to amend the Indictment, specifically specification one to the first count by changing the word "another" to "other", the word "offense" to "offenses" and by adding at the end thereof of that specification to the first count the words "and Attempted Aggravated Murder". Do I state your amendments correctly, sir?

MR. SCOTT: Yes, Your Honor.

JUDGE HENDERSON: And I believe those were the only amendments that had been offered to the Indictment?

MR. SCOTT: That's correct.

JUDGE HENDERSON: Is there objection?

MR. TINGLE: No objection, Your Honor.

JUDGE HENDERSON: Mr. Scott, I'm going to ask you then--I will grant your motion. I'll ask that you amend your Indictment by interlineation. You may take the Court's file to your counsel table.

MR. SCOTT: May I approach the bench, Your Honor?

JUDGE HENDERSON: Yes, sir.

MR. SCOTT: Let the record show that I have amended here in open court by interlineation to make the

changes as the Court has recited in the first specification the first count. Counsel have initialed and dated the change on the Indictment.

JUDGE HENDERSON: Could we have the defendant also, since he's being consulted on this matter?

MR. SCOTT: Let the record show that the defendant did initial on the margin the changes made by interlineation with the advice and assistance of his counsel and here in open court.

JUDGE HENDERSON: The Indictment seems to be in order and the Court is going to make certain inquiries of the counsel for the defendant and the defendant as to the proposed entry of the guilty plea. It is necessary that questions be asked and answers thoughtfully given in a case of this sort. I'm going to inquire of the attorneys for the defendant, have you fully investigated the facts and the law of this case and determined whether there exists any question of the admissibility of any claimed admissions, confessions or other evidence under Federal and State law and advised your client concerning the same?

MR. TINGLE: We have, Your Honor.

JUDGE HENDERSON: Have you informed your client of the elements of the offenses with which he is charged, of all defenses which may be available to him and of all of his Constitutional rights, both State and Federal?

MR.TINGLE: Yes, we have.

JUDGE HENDERSON: Are you willing that your client be sworn?

MR. TINGLE: To the extent of answering questions concerning his waiver of rights, yes, Your Honor.

JUDGE HENDERSON: Mr. Stumpf, do you understand that you have a Constitutional privilege against self-incrimination?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: With a full understanding that anything you say may be used against you and probably will be used against you, are you willing to waive your privilege against self-incrimination and be sworn to tell the truth concerning your understanding of your rights here in this court?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: I'm going to ask at this time then that the Bailiff administer the oath to the defendant.

(Whereupon, John David Stumpf was sworn to tell the truth.)

JUDGE HENDERSON: Gentlemen of counsel, you may be seated.

MR. STEPHENS: Your Honor, may we approach the bench?

JUDGE HENDERSON: Yes, sir.

(Whereupon, counsel approached the bench and conferred with the Court out of the hearing of the Court. Reporter.) (Whereupon, counsel returned to their tables and the following proceedings were had before the Court.)

JUDGE HENDERSON: I think it would be appropriate that the defendant return to counsel table. Questions will be asked of him by the members of the judicial panel, but it is not necessary that he remain in the witness stand.

Mr. Stumpf, I'm going to ask you a number of questions and if you do not understand those questions you may inquire of your attorneys to better able you to understand everything that is being asked you. These have to do with the rights that you have as a person who has been accused of a crime. Do you understand that you have a constitutional privilege against self-incrimination?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: With a full understanding that anything that you say may be used against you, are you willing then to answer questions with regard to your understanding of your rights?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Now, you heard the questions that I put to your attorneys, I believe, relative to their advice to you and their counseling of you, did you not?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you personally acknowledge that your attorneys have informed and advised you as they say they have?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Are you satisfied with the services which they have performed for you?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Mr. Stumpf, do you have any physical or mental health problems today?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you under the influence of alcohol or any medicine or drug today? Let's take it one at a time. Are you under the influence of alcohol today?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you under the influence of any medicine or drug today?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Do you understand that you are charged with several offenses? The first offense being that of Aggravated Murder, that there have been two specifications being presented at this time in this particular proceedings, to wit: Aggravated Robbery and Attempted Murder and possession of a firearm while committing those offenses. Do you understand that?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that you have been charged with the offense of Attempted Aggravated Murder, which is a felony in the first degree?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: For the first count, which is that of Aggravated Murder, you are subject to the following penalties: you are subject to being--to a sentence of twenty

years without probation, that is, a sentence of life without probation for twenty years; a sentence of life without probation for a period of thirty years and the death penalty by electrocution could be imposed against you. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that you would be subject under the--under specification four to the first count to three years incarceration before you begin to serve any other sentence?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that the attempted Aggravated Murder, which is set forth in count two, is a felony in the first degree and that you could be sentenced to be incarcerated for a period of four, five, six or seven but not more than twenty-five years? Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that for a felony of the first degree that you could be fined not more than $10,000.00?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: And that you could receive both the fine and the incarceration, which I have mentioned?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Are you presently on probation or parole, sir?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Do you understand that if you plead guilty you will waive, that is, you will give up the right to a jury trial or trial by the Court; the right to be presumed innocent and until proven guilty beyond a reasonable doubt; the right to confront and to question the witnesses against you and to have compulsory process for obtaining witnesses in your favor; the right to remain silent or to testify at your trial as you may choose and that no inferences may be drawn if you choose not to testify at your trial. Do you understand that you may be giving up those rights?

MR. STEPHENS: Your Honor, with reference to that, we have explained that to the defendant. He was going to respond but we have informed him that there is, after the plea, a hearing or trial relative to the underlying facts so that he is of the belief that there will be presentation of evidence and I wanted to make that clear to the Court with reference to his right of waiver of trial to Court.

JUDGE HENDERSON: I understand that and I appreciate your bringing that to my attention, Mr. Stephens. Of course in the sentencing portion of this trial you do have those rights to speak in your own behalf to present evidence and testimony on your own behalf. My statement to you and my question to you was intended to except those rights that you do have. Counsel, is that satisfactory?

MR. STEPHENS: Yes, sir.

JUDGE HENDERSON: Thank you. Do you understand that if you have made any admission or confession or if any evidence against you was seized, you have the right to have a preliminary hearing on the admissibility thereof before you plead guilty or are brought to trial. Do you want such a

preliminary hearing or do you want the Court to accept your plea of guilty to the counts which your counsel has mentioned?

MR. STEPHENS: Your Honor, we have previously explained to the defendant that he has been afforded at one time an opportunity for a preliminary hearing. He understands that, he does not want any preliminary hearings prior to this plea.

MR. SCOTT: May I address the Court a moment?

JUDGE HENDERSON: Yes, sir.

MR. SCOTT: I think the record should reflect there was a timely motion filed to suppress certain evidence, particularly statements made by the defendant, that the Court has heard the evidence with respect to that motion and has heretofore denied the motion to suppress with regard to those matters.

JUDGE HENDERSON: Yes, sir. Anything further?

MR. SCOTT: Nothing further.

MR. STEPHENS: Nothing, Your Honor.

JUDGE HENDERSON: Do you understand, Mr. Stumpf, that if any promises or inducements have been made to you by any person to cause you to plead guilty that they are not binding upon the Court, that if you plead guilty the court, this panel of Judges, will decide your sentence after considering all of the evidence that is to be presented and evidence in mitigation of punishment and after considering a presentence investigation, report and recommendation approved and prepared by the probation department and that you may receive the maximum sentence prescribed by law. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Have any promises or inducements been made to you, sir, other than the agreement which you have affirmatively acknowledged on the record?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you in fact guilty of count one with specification one and specification four?

MR. STEPHENS: One moment, Your Honor. Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of his right to present evidence at a later time relative to his conduct, but he'll respond to that.

JUDGE HENDERSON: At no time am I implying that the defendant will not have the right to present evidence in mitigation hearing and I do appreciate it, Mr. Stephens, that you bring this to the attention of the Court. And I'm going to ask that the defendant, himself, respond to the question that I asked with that understanding that he has the right to present evidence in mitigation. I'm going to ask the defendant if he is in fact guilty of the charge set forth in Count one, including specification one and specification four?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: I'm going to ask you if you are in fact guilty of the charge set forth against you in Count two of the Indictment, which is Attempted Aggravated Murder, a felony in the first degree?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: And I'm going to ask you and then I'll explain my question and give you an opportunity to answer. There is a specification to the second count, that of having a firearm on or about your person or under your control while committing the aforesaid offense of Attempted Aggravated Murder. I understand that by reason of the statement of the counsel for the State of Ohio that there are two specifications of a similar purport and that the two will be considered as one, but are you in fact guilty of this specification to the second count?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: The Court would at this time ask the defendant be seated. I'm going to ask that my associates here at the bench have an opportunity to ask such questions at this time as they desire and I'll ask Judge Bettis, is there anything that you desire?

JUDGE BETTIS: No questions.

JUDGE HENDERSON: Judge Rice?

JUDGE RICE: No questions.

JUDGE HENDERSON: Mr. Scott?

MR. SCOTT: If the Court please, if the Court is inclined at this point after having made full inquiry of the defendant to accept the--to propose that the defendant actually enter the pleas as proposed and accept the pleas as proposed or as entered, then the State would at that time ask leave to nolle the remaining portions of the Indictment.

JUDGE HENDERSON: Before I get to that point, I would also ask counsel for the defense if there's anything further at this time?

MR. TINGLE: Not at this time, Your Honor.

MR. SCOTT: Could we approach the bench for a moment, Your Honor?

JUDGE HENDERSON: Yes, sir.

(Whereupon, counsel for the respective parties approached the bench, and conferred with the Court out of the hearing of the Court Reporter.)

(Whereupon, counsel returned to their trial tables, and the following proceedings were had before the Court.)

JUDGE HENDERSON: It has been brought to the Court's attention, and properly so, that the matter of sentencing left to the discretion of the Court in this matter based upon the evidence that is presented and the evidence that is presented in mitigation of punishment and one thing that was not mentioned by this speaker is in the matter of punishment that it is possible that Count one and Count two could run consecutively or concurrently at the instance of the Court. And I want to ask the defendant if he understands that could be the case?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: You understand then that the matter of sentencing itself, within the frame work of the statute with regard to sentences to be imposed in such cases, rests then with this panel of Judges?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Thank you. You may be seated. Now, it is necessary in a capital case that, the Court

hear evidence so that it is satisfied that the offenses to which a plea of guilty is offered actually were committed by the defendant. I'm sure that everyone can understand the reason for that. This is a serious offense--offenses I should say, and this panel does not desire to have the defendant enter a plea of guilty and then the panel not be satisfied that the offense to which the plea of guilty was offered was actually committed by the defendant. So, there will be a proceeding, a trial if you will, as to the necessary elements to establish the guilt of the defendant, even though he offers a plea of guilty. I have asked the defendant if he is in fact guilty of those charges and I'm going to ask him in another form. The defendant has heretofore when he appeared before the Court entered pleas of not guilty to those offenses and I'm going to ask then if the defendant desires to withdraw his pleas of not guilty to the first count and specification one and four and to the second count with its specifications? Is it your desire after counseling with your attorneys to withdraw your pleas of not guilty to those offenses?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Very well. I'm going to ask you now, formally, how do you plead to Count one with specifications one and four?

THE DEFENDANT: Guilty.

JUDGE HENDERSON: How do you plead to Count two with specification?

THE DEFENDANT: Guilty, sir.

JUDGE HENDERSON: You may be seated. Where pleas of guilty are accepted and subject to the presentation of evidence the Court does find that your pleas have been made freely, understandingly and voluntarily with full knowledge of

the nature of the accusation and the consequences of the pleas and without undue influence, compulsion, duress or promise of leniency.

Mr. Scott, you had moved the Court to nolle certain pleas. I'm going to ask that you withhold that action until such time as we have had our evidentiary hearing.

MR. SCOTT: That's fine, Your Honor.

MR. STEPHENS: Your Honor, may we approach the bench?

JUDGE HENDERSON: Yes, sir.

(Whereupon, counsel for the respective parties approached the bench, and conferred with the Court out of the hearing of the Court Reporter.) (Whereupon, counsel returned to their trial tables, and the following proceedings were had before the Court.)

MR. SCOTT: Your Honor, consistent with the sidebar conference, I would at this time, as previously stated as part of the agreement here, move to nolle the remaining counts, which I believe are three, four and five and also the specifications two and three to the first count and request that the Court defer ruling on the motion to nolle until following the evidentiary hearing and the determination of the Court as to the degree of offense the factual basis for the plea of guilty to the first count which I believe is the only one the statute requires an evidentiary hearing upon that is the Aggravated Murder and ask that the Court defer ruling on the motion to nolle until that time.

JUDGE HENDERSON: Is there objection, gentlemen?

MR. TINGLE: No objection, Your Honor.

JUDGE HENDERSON: The Court then will defer ruling upon the motion to nolle.

It is 2:30 and a little bit past that. It would seem appropriate to the Court that the Court recess until 9:00 o'clock tomorrow morning at which time the State of Ohio should be ready then to present evidence with regard to the matters set forth in the Indictment. Is that agreeable with counsel?

MR. SCOTT: For the State, yes, Your Honor.

JUDGE HENDERSON: The Defendant?

MR. TINGLE: Yes, Your Honor.

JUDGE HENDERSON: Then the Court should ask my fellow Judges, is that agreeable with you?

JUDGE BETTIS: Yes, sir.

JUDGE HENDERSON: And with you, sir?

JUDGE RICE: Agreeable, sir.

JUDGE HENDERSON: Then at this time, Mr. Bailiff, you may adjourn Court for the day.

(Whereupon, at 2:33 o'clock p.m. Court recessed to reconvene at 9 o'clock a.m., Sepember 18, 1984.)

APPENDIX S

INDICTMENT

THE STATE OF OHIO
COURT OF COMMON PLEAS

Guernsey County, ss:
Of the Term of May *in the year of our Lord,*
one thousand nine hundred and eighty—four (1984).

COUNT ONE:

The Jurors of the Grand Jury *of the State of Ohio, within and for the body* of *the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that* John David Stumpf, R. D. 1, Box 41, Canonsburg, PA *on or about the* 14th *day of* May, 1984 *at the County of Guernsey aforesaid,*

did purposely cause the death of another person, to wit: Mary Jane Stout, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, the offense of "Aggravated Robbery", in violation of Ohio Revised Code, Section 2903.01(B), entitled 'AGGRAVATED MURDER", and contrary to the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION ONE TO THE FIRST COUNT:

The Grand Jurors further find and specify, under Ohio Revised Code, Section 2929.04(A) (3), in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense was committed for the purpose of escaping detection, apprehension, trial or punishment for other offenses committed by the above-named John

David Stumpf, to wit: "AGGRAVATED ROBBERY" [& ATTEMPTED AGGRAVATED MURDER (by interlineation).]

SPECIFICATION TWO TO THE FIRST COUNT:

The Grand Jurors further find and specify under Ohio Revised Code, Section 2929.04(A)(5) and in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, to wit: Mary Jane Stout and Norman Stout.

SPECIFICATION THREE TO THE FIRST COUNT:

The Grand Jurors further find and specify under Ohio Revised Code, Section 2929.04 (A) (7), and in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense was committed while the above-named John David Stumpf was committing, or attempting to commit, or fleeing immediately after committing or attempting to commit the offense of AGGRAVATED ROBBERY", and further that the above-named John David Stumpf was the principal offender in the commission of the offense of "AGGRAVATED MURDER" as charged in the First Count.

SPECIFICATION FOUR TO THE FIRST COUNT:

The Grand Jurors further find and specify, under and in compliance with Ohio Revised Code, Section 2941.141, that the above-named John David Stumpf had a firearm on or about his person or under his control while committing the aforesaid offense.

COUNT TWO:

County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did purposely engage in conduct, which, if successful, would have constituted the offense of "Aggravated Murder", by then and there purposely attempting to cause the death of another person, to wit: Norman B. Stout, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit the offense of "Aggravated Robbery", all being in violation of Ohio Revised Code, Section 2923 .02(A), entitled "ATTEMPTED AGGRAVATED MURDER" (Felony in the First Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO THE SECOND COUNT:

The Grand Jurors further find and specify, under and in compliance with Ohio Revised Code, Section 2941.141, that the above-named John David Stumpf had a firearm on or about his person or under his control while committing the aforesaid offense.

COUNT THREE:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, in attempting or committing a theft offense as defined in Ohio Revised Code, Section 2913.01, to wit: the offense of "Grand Theft" of

property of one Norman B. Stout and one Mary Jane Stout, or in fleeing immediately after such attempt or offense, did then and there have a deadly weapon, to wit: a firearm, on or about his person or under his control, in violation of Ohio Revised Code, Section 2911.01, entitled "AGGRAVATED ROBBERY" (Aggravated Felony in the First Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO THE THIRD COUNT:

The Grand Jurors further find and specify, under and in compliance with Ohio Revised Code, Section 2941.141, that the above-named John David Stumpf had a firearm on or about his person or under his control while committing the aforesaid offense.

COUNT FOUR:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did with purpose to deprive the owner thereof, Mary Jane Stout, knowingly obtain or exert control over a certain motor vehicle, to wit: a 1976 Plymouth Sedan, Serial No. RH41G6A160499, by threat, in violation of Ohio Revised Code, Section 2913.02, entitled "GRAND THEFT—MOTOR VEHICLES" (Felony in the Third Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

COUNT FIVE:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did with purpose to deprive the owner thereof, Norman B. Stout, knowingly obtain or exert control over a certain firearm, to wit: a .357 caliber Smith and Wesson, Model 28-2, Serial Number N552178 hand gun, by threat, in violation of Ohio Revised Code, Section 2913.02, entitled "GRAND THEFT—FIREARM" (Felony in the Fourth Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/J. R. Scott
Prosecuting Attorney

APPENDIX T

COURT OF COMMON PLEAS
GUERNSEY COUNTY, OHIO

STATE OF OHIO

Plaintiff CASE NO. 9684

VS

JOHN DAVID STUMPF MOTION

Defendant

Now comes the Defendant by his Attorneys Lewis N. Tingle and Craig Stephens and moves the Court for leave to withdraw his former plea of Guilty entered in the above case and setting this case for trial. In the alternative, the Defendant requests the Court to set aside the sentence imposed in this case and to order that a new sentencing (mitigation) proceeding be conducted.

/s/LEWIS M. TINGLE
Attorney for Defendant
138 North Seventh Street
Cambridge, OH 43725
(614) 439-7745

MEMORANDUM

This Court previously accepted a plea of Guilty from the Defendant and, following a hearing, imposed the Death Penalty upon the Defendant. At that time, a Co-Defendant was in custody in the State of Texas awaiting extradition to Ohio. This Co-Defendant, Clyde Daniel Wesley, was not

available to the Court or to the Defendant for testimony at that time. In fact, that Co-Defendant had made no statement to any law enforcement officer concerning the crimes for which the Defendant was charged and convicted.

Subsequent to this Defendant's sentencing, Clyde Daniel Wesley was returned to the State of Ohio and stood trial upon identical charges to that of the Defendant. Following that trial, Clyde Daniel Wesley was found Guilty of Aggravated Murder but received a sentence of life in prison with parole eligibility after twenty (20) years. During the course of that trial, the State produced a witness who testified as to conversations with Clyde Daniel Wesley while both were incarcerated in the Guernsey County Jail. This witness, James Eastman, testified that Clyde Daniel Wesley told him that he was the one who actually shot Mary Jane Stout. A copy the transcript of that testimony is attached hereto.

At the time of sentencing, this Court issued its separate Findings and specifically found that John David Stumpf was the principal offender in the shooting and killing of Mary Jane Stout. This testimony of James Eastman, which was not available to this Defendant at the time of sentencing, directly contradicts this finding of the Court. It is evidence which the Court should have available to it in determining the appropriate sentence to be imposed against John David Stumpf. It is of such a nature and importance that it warrants the withdrawal of the Guilty plea previously entered by this Defendant. At the very least, it is evidence which must be considered by the Court in determining the appropriate sentence to be imposed upon John David Stumpf. It is evidence which is material to the conduct of John David Stumpf and supports the evidence offered at the sentencing hearing that this Defendant was not the principal offender in

the crime charged. A review of that evidence indicates it has a high degree of credibility when analyzed with the other evidence available.

Respectfully submitted,

/s/LEWIS M. TINGLE

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing Motion was served upon C. Keith Plummer, Prosecuting Attorney, 139 Courthouse Square, Cambridge, Ohio 43725, by placing the same in the United States Mail addressed to him this 7th day of June, 1985.

/s/LEWIS M. TINGLE

APPENDIX U

Excerpt from October 1, 1985 Transcript of Hearing on Stumpf's Motion to Withdraw his Guilty Plea

* * *

MR. TINGLE: If the Court please, the motion which has been filed on behalf of the defendant requests in the alternative the withdrawal or leave to withdraw the plea of "guilty" previously entered by the defendant and in the alternative for a new hearing to be conducted concerning the penalty to be imposed against this defendant. In support of that motion, I believe the State of Ohio, the Prosecuting Attorney, will agree to a stipulation that the testimony adduced at the trial of Clyde Daniel Wesley by or from one James Eastman, Case #9692, and also the testimony of Clyde Daniel Wesley in that same case can be admitted for consideration of the Court as it relates to the motion filed by the defendant as the testimony in the entirety of both witnesses.

MR. SCOTT: Upon the representation of the Court Reporter that what Mr. Tingle has is, in fact, the entire testimony of Mr. Wesley and the entire testimony of the witness Eastman, I'll agree that it be stipulated that that is what it is and nothing more rather than bringing the Court Reporter to the stand and doing all those things. If she indicates to us that that is the complete transcript of those two people, I have no problem in putting it in.

JUDGE HENDERSON: Do I understand the stipulation is that the testimony of these two individuals, Clyde Daniel Wesley and Mr. Eastman, that may be received in evidence in this manner?

MR. SCOTT: As to that's what it is and nothing more, that that was the testimony as given in the Wesley case.

JUDGE HENDERSON: Very well.

MR. TINGLE: On that basis, I would offer Defendant's Exhibit "2" and "3" then.

JUDGE HENDERSON: And on that basis, those are admitted, "2" and "3".

MR. TINGLE: If the Court please, in support of the notion then that is the only testimony or physical evidence which will be offered in support of the motion. I would like to address the Court on the issue itself.

JUDGE HENDERSON: Very well.

MR. TINGLE: If the Court please, the basis upon which the motion is filed or brought to the Court's attention is the fact that at the time of sentencing, this Court, as required by law, issued a written finding; and part of that finding was or were the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The first of those items listed under number 1 that the Court finds beyond a reasonable doubt that the defendant was the principal offender in Count 1 of the indictment. The State of Ohio during the trial of Clyde Daniel Wesley, Case #9692, produced a witness by the name of James Eastman. To summarize briefly, Mr. Eastman had been a cell mate of Clyde Daniel Wesley while he was incarcerated in the Guernsey County Jail following his extradition from the State of Texas. It was the testimony of Mr. Eastman that during the course of their companionship in that cell, Mr. Wesley related to him the story of this crime and how it occurred. The testimony of Mr. Eastman, found on page 12 of that transcript of his testimony, does indicate, and

he stated directly, that as they were getting ready to leave, Wesley related to him he heard her moan, meaning Mrs. Stout, or cry out something, turned around and shot her again. Wesley said he went back and shot Mrs. Stout again. Put into the context of the entire testimony, the shooting of Mrs. Stout as related by Mr. Eastman, James Eastman, occurred in two phases. She was shot, they left the room, as they were leaving they heard her moan, she was shot again. Comparing that to the testimony of Clyde Daniel Wesley as offered at trial, that scenario is followed fairly closely. But when questioned about how James Eastman could have known these things or where he got his information, Mr. Wesley's explanation was that during the course of their companionship in that jail cell, he had a transcript of the case of "State versus John Stumpf" to use in his own trial preparation, that he discussed the case somewhat with Mr. Eastman and Mr. Eastman had access to that transcript and read the account in the transcript; thereby acquiring the knowledge that he testified to. The problem with Wesley's explanation is the fact that there is no account that matches that situation or that scenario in the transcript of John David Stumpf. There is no account which states Mrs. Stout was shot, they left the room, heard her moan, went back and shot her again. The only place that that appears is in the case of Clyde Daniel Wesley. It would have been impossible for Mr. Eastman to have acquired that knowledge from the transcript of John David Stumpf. It, therefore, follows that he must have acquired that knowledge from Clyde Daniel Wesley personally.

On that basis, it does indicate that the Courts finding that the defendant, John Stumpf, was the principal offender. In other words, the one who shot Mary Jane Stout is contradicted by the testimony of James Eastman, and the explanation of Clyde Daniel Wesley is not sufficient to contradict James Eastman's testimony. It's on that basis, then that we have filed this motion, brought it to the Court's attention, asking for the alternate forms of relief. Thank you.

JUDGE BETTIS: Well, you were counsel for Mr. Stumpf, and I'm sure he pled guilty, and I'm sure you reviewed the details of his plea with him many, many times. Both of you are very competent counsel, I heard you. At least, that's my view. Didn't you, Lew?

MR. TINGLE: Yes.

JUDGE BETTIS: How many hours did you spend with Mr. Stumpf in discussing the case with him before you pled him guilty?

MR. TINGLE: Quite a few, Your Honor. Accurately, I couldn't tell you, it was a substantial number.

JUDGE SETTIS: All right, thank you.

JUDGE HENDERSON: Mr. Scott.

MR. SCOTT: If the Court: please, I beleive we need to talk about two other things before we get to the substance of what Eastman had to say and what Wesley had to say. Initially, I think we need to look at Section 2945.36 which talks about a three judge panel in a death penalty case and what procedurally is necessary. As I mentioned earlier, the statute says that this Court can determine matters of law and fact by a majority decision. However, decisions regarding the guilt, or in this case, the imposition of the death penalty, must be unanimous. With that in mind, I think we need to look at what the defendant is asking by means of this motion. Initially, the defendant is asking for a withdrawal of the previous plea of "guilty". It seems to me that is a matter of law and does not go to the question of the imposition of the death penalty nor to the question of guilt. And that can be initially, I believe, determined by the remaining two judges in this panel, being a majority of the original panel. As far as the

merits of that motion, there is no indication as the Court has inquired that Mr. Stumpf was not fully aware of what he was doing when he entered the plea of "guilty". It was, if you'll recall, a negotiated plea wherein he entered a plea of "guilty" to certain counts and to certain specifications to those counts in return for the State dismissing certain other counts or certain other specifications. I believe in our memorandum in opposition to the motion we cite the provision of Criminal Rule (3) which states that a motion to withdraw a "guilty plea is directed to the sound discretion of the Court. And I'll quote, "A motion to withdraw a plea of 'guilty' or 'no contest' may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the Court, after sentence, may set aside the judgment of conviction and permit the defendant to withdraw his plea". We cite a case or two in here which indicates that if the defendant knew what he was doing and in the absence of coercion or mistake or something of that nature which casts doubt on the voluntariness of it or whatever, the motion should be denied. We heard nothing from the defense in this case in support of this motion to indicate that the defendant was anything than fully informed and that he intelligently made the decision with the assistance of his counsel after having everything explained to him that pertains to this plea of "guilty" and that he agreed and that the "guilty" plea proceedings were, in fact, undertaken and the inquiries of the Court made at that time, which I believe is all a matter of record in this case.

So, therefore, I think that the initial motion by the defendant to withdraw the "guilty" plea should be denied because there's been nothing shown to the Court to justify doing anything else.

With regard to the other alternative relief requested by the motion, it is tantamount to a motion for a new trial, at least in part, with regard to the sentencing phase of the former trial.

The Court, having following the plea of "guilty", heard the evidence and found the defendant "guilty" of the offense, guilty of the specifications by unanimous decision of the three judge panel. There is no reason to disturb that finding because of the fact that this is not a case where the trial proceeded on a "not guilty" plea; but the defendant admitted in open Court, as we cite in our memorandum, that there is nothing more solemn or whatever than a plea of "guilty" where he admitted that he did, in fact, purposely kill Mary Jane Stout and pleaded "guilty" to certain of those specification. It seems to me that in order to determine this part of the motion, the State would take the position that the remaining two judges can handle that as well because it is not a matter at this point directly dealing with the imposition of the death penalty nor is it a matter dealing with guilt, the finding of guilt. It is a question or a request to vacate the former sentence which would be a matter of law, arguably at least. The is very little, if any, authority that I could find on this exact problem where we don't have an intact panel left, but it would be our position that the two remaining judges can make that decision because it is a matter of law. And whether or not the Court feels that the presence of the witness Eastman is necessary in order to do that or whether the Court can read the record and determine from the record of his, testimony in the Wesley case, is a matter for the Court to determine. I would hasten to go on and say that although the Court did in it's unanimous opinion setting forth the reasons why the aggravating circumstances outweighed the mitigating circumstances shown, did make a finding that the defendant, Stumpf, was the principal offender in the case, that finding was not necessary under the specifications to which the defendant entered his plea. That even if the Court found that the defendant was an aider and abettor or even if the evidence showed that the defendant was an aider and abettor under those specifications, the death penalty still can be imposed. The question really before the Court is whether or not the information provided now to the Court would change the Court's finding because

the evidence is in conflict on the point; that is, that Mr. Wesley testified at his own trial, and the Court has that testimony that he did not fire the fatal shot. Eastman's testimony was as to a conversation with Wesley which occurred long after the Stumpf trial had been concluded. The circumstantial evidence, the ballistics evidence certainly supports the Court's original finding that Stumpf was the—in effect, the shooter or the principal offender.

Now, it would seem to me the Court's first determination would be as to whether or not this new information, being the testimony of Wesley and the testimony of Eastman, is sufficient to change the Court's opinion as to whether or not the evidence still showed or did not show that Stumpf was the principal offender. And if the Court should then conclude that the evidence now, the newly discovered evidence if you will, does change the picture to the point where that finding is not proper, whether or not that makes any difference; nevertheless, on the imposition of the death penalty--

JUDGE BETTIS: Of course Mr. Scott, pardon me for interrupting, but if we had not, been satisfied that Stumpf was, in fact, the trigger man, the principal offender, and we were satisfied that he was, in fact, an aider and abettor, that may very well have had an effect upon this Court's determination of whether the death penalty should follow. I'm not saying it would, but it's possible.

MR. SCOTT: That's right. I think the first decision this Court would have to make is whether or not this additional information changes the picture as to that finding that was previously made. And if it does, does that, in turn, change the appropriateness of the death penalty in this case in the judgment of the Court?

JUDGE BETTIS: Let me follow that up. My recollection was that Wesley was in jail in Texas at the time of the Stumpf trial.

MR. SCOTT: That's correct, sir.

JUDGE BETTIS: You were aware of that, were you not, Mr. Scott?

MR. SCOTT: Yes, I knew of that.

JUDGE BETTIS: And you were aware of it too?

MR. SCOTT: Everybody was aware of it.

JUDGE BETTIS: There wasn't anything to prevent either the State or the defense from talking to Mr. Wesley. Now, as a practical matter, he probably wasn't going to have very much to say to anybody; but you didn't ask him, did you?

MR. TINGLE: The defense did not, no, Your Honor.

JUDGE BETTIS: Or anyone on behalf of the defense. He was never asked by anybody, so he was available?

MR. SCOTT: I believe that's correct, yes, Your Honor.

JUDGE BETTIS: We knew he was in Texas, defense knew that.

MR. TINGLE: He was fighting extradition:. Though, as far as availability for trial, he was not available.

JUDGE BETTIS: You and I know as a practical matter he probably wasn't going to give you the time of day if you

went down. But the point is, you never asked him what he did in relation to Mrs. Stout or anybody else, did you?

MR. TINGLE: I think the prosecution was in Texas at that time during the period he was fighting extradition. What transpired between them and Wesley and Wesley's counsel in Texas I'm not privy to.

JUDGE BETTIS: Okay, but you didn't.

MR. SCOTT: I can tell you, but there's no record on it.

JUDGE BETTIS: Let me follow up. No one for the defense asked Mr. Wesley; and at least at this point, all we have is verbiage, it's not evidence. We have verbiage, we have a statement by Mr. Tingle that this is what Wesley would do, and we have a letter allegedly signed by Mr. Stout. So is there any evidence from anybody?

MR. SCOTT: I have nothing to present, Your Honor.

JUDGE BETTIS: In the record so far that, in fact, Wesley was the trigger man.

MR. TINGLE: Eastman's testimony, Your Honor. At Wesley's trial.

JUDGE BETTIS: Okay. And isn't there some---don't we have some right to read that and determine whether that is, in fact, credible testimony?

MR. TINGLE: Very definitely, Your Honor.

JUDGE BETTIS: I haven't read it. I'm certainly going to take the privilege to do so.

MR. TINGLE: And compared also against Wesley's testimony.

JUDGE BETTIS: I'm going to read both Eastman and Wesley because I didn't have the privilege of hearing that testimony.

MR. SCOTT: If it's appropriate, I can tell you what happened in Texas when I talked to his Texas lawyer.

JUDGE HENDERSON: I don't believe that's necessary at this time. We're hearing the matter of Eastman at this time, and we're not hearing the motion which has not been made yet.

MR. SCOTT: The inquiry was made, and I have an answer. But if you don't want to hear it at this point, that's fine.

JUDGE BETTIS: It's a motion of the defendant, not the State.

MR. SCOTT: But I have nothing other to say than it seems to me I don't presume to advise this Court how to proceed. We are under a set of circumstances, which to my knowledge, has not occurred under our present set-up with regard to capital cases. It seems to me the Court must first look at what you have on the record there that was presented today to determine if you can determine from that alone whether or not Eastman's testimony is of sufficient credibility to warrant further consideration or whether you need to hear testimony from Eastman live. It seems to me that's the first thing you need to consider and once you have made that determination as to whether or not a new trial is warranted on the basis of that evidence. I believe that this Court procedurally--this Court can proceed with the two remaining members of the panel because we are not dealing directly with

the imposition of the death penalty nor directly with the adjudication of guilt. We are dealing with a matter of law as to whether or not the previously imposed sentence shall be vacated. Thank you.

JUDGE HENDERSON: Anything further, Mr. Tingle?

MR. TINGLE: Nothing further, Your Honor.

JUDGE HENDERSON: We'll take this matter under advisement. The Court is going to, so that they don't get lost, is going to present two items: the letter from Mr. Damiani, Supreme Court, which I think all counsel have received a copy and also the judgment entry of the Court of Appeals which remands this case, if necessary. I believe it says for the purpose of the determination of any and all motions now, parenthesis, then pending before it. Those two matters, I believe, we'll just have them put into the record.

Anything further? We'll take this matter under advisement.

(Whereupon, at 3:17 o'clock p.m. the foregoing proceedings were terminated.)

APPENDIX V

IN THE COURT OF COMMON PLEAS

GUERNSEY COUNTY, OHIO

STATE OF OHIO,	:	
		CASE NUMBER 9684
PLAINTIFF,	:	
		JUDGMENT ENTRY
v.	:	
JOHN DAVID STUMPF,	:	
DEFENDANT.	:	

Journal Vol. Page

Date of Entry October 2, 1985

Motion of Defendant filed June 7, 1985 was heard before Judge Henderson and Judge Bettis on October 1, 1985. Defendant's Exhibits 1, 2, and 3 were offered in evidence. Plaintiff stated it had no objection to No. 1 and no objection to No. 2 and No. 3 as being transcripts of Eastman and Wesley. Counsel for Defendant and State of Ohio made statements on record. The Court took the matter under advisement and after having considered the same, does overrule the Motion to Withdraw Former Plea and the Alternative Motion to Set Aside the Sentence Imposed.

cc: Prosecuting Attorney
Lewis M. Tingle

/s/JOHN E. HENDERSON, JUDGE
/s/J. WAREN BETTIS, JUDGE

(10)

Supreme Court U.S.
DEC 10 2004
OFFICE OF THE CLERK

CAPITAL CASE

No. 04-637

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

BETTY MITCHELL, Warden,
Petitioner/Appellant

v.

JOHN DAVID STUMPF
Respondent/Appellee

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent/Appellee, John David Stumpf, seeks leave to proceed *in forma pauperis*.

Respondent was granted leave to so proceed in both the U.S. District Court and the U.S. Court of Appeals, and counsel was appointed for Respondent under the Criminal Justice Act of 1964, 18 U.S.C. § 3006. Consequently, pursuant to Rule 39.1, no affidavit is attached.

Respectfully Submitted,

ALAN M. FREEDMAN
One of Respondent's Attorneys

ALAN M. FREEDMAN
Counsel of Record
CAROL R. HEISE
Midwest Center for Justice
831 Main Street
Evanston, IL 60201
(847) 492-1563 (ph)
(847) 492-1861 (fax)

CAPITAL CASE

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RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

ALAN M. FREEDMAN
Counsel of Record
CAROL R. HEISE
Midwest Center for Justice
831 Main Street
Evanston, IL 60201
(847) 492-1563 (ph)
(847) 492-1861 (fax)

QUESTIONS PRESENTED

1. Whether the Sixth Circuit correctly determined that the facts in the record – including Respondent's diminished mental capacity, potentially ineffective counsel, as well as numerous indications during the plea proceedings that Respondent never understood the true nature of the charges against him – outweigh the relative import of counsel's representation that Respondent understood the charges, and render Respondent's guilty plea involuntary.

2. Whether the Sixth Circuit correctly determined that the state's prosecution of successive defendants was based on wholly inconsistent, irreconcilable theories and therefore violated Respondent's due process rights.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REASONS TO DENY THE PETITION 2

I. The Sixth Circuit's decision holding respondent's guilty plea involuntary is entirely consistent with *Henderson v. Morgan* as well as the developing trends among the circuits, and represents the type of fact-intensive decision this court routinely considers inappropriate for *certiorari*. 2

II. The Sixth Circuit's decision that the prosecution secured successive convictions based on inconsistent, irreconcilable theories was correctly reached and is consistent with this court's precedent. 7

CONCLUSION 10

TABLE OF AUTHORITIES

Allen v. Mullin, 368 F.3d 1220 (10th Cir. 2004) 1, 2, 6

Berger v. United States, 295 U.S. 78 (1935), *overruled on other grounds, Stirone v. United States*, 361 U.S. 212 (1960) 9

Boykin v. Alabama, 395 U.S. 238 (1969) 2

Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) 8

Gaddy v. Linahan, 780 F.2d 935 (11th Cir. 1986) 1, 6, 7

Gregory v. Solem, 774 F.2d 309 (8th Cir. 1985) 2, 6

Henderson v. Morgan, 426 U.S. 637 (1976) . . . . . passim

Kyles v. Whitley, 514 U.S. 419 (1995) 7

Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995) 8

Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000) 8

Stirone v. United States, 361 U.S. 212 (1960) 9

Stumpf v. Mitchell, 367 F.3d 594 (6th Cir. 2004) . . . . . passim

Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) 8

United States v. Agurs, 427 U.S. 112 (1976) 9

United States v. Johnston, 268 U.S. 220 (1925) 7

INTRODUCTION

The Sixth Circuit's decision rests upon an exhaustive review and application of the facts specific to Respondent's case. According to the Sixth Circuit, those facts lead to two conclusions: Respondent's guilty plea was involuntary according to the standards developed by this Court, and the State's use of conflicting theories in order to convict Respondent and his accomplice for firing the same shot violated due process. The Sixth Circuit reached these conclusions only after it excavated all the relevant facts and applied the appropriate standards to those unique facts. Petitioner's claim that the Sixth Circuit's decision creates "a wholesale change in the legal landscape surrounding guilty pleas," (Brief for the Petitioner at 3), is as "exaggerated" as it was when raised in *Henderson v. Morgan*, 426 U.S. 637, 647 (1976) ("We think Petitioner's fears are exaggerated."). The Sixth Circuit simply recognized Respondent's case for what it is: a unique set of facts and circumstances that establish grounds for relief under the relevant standards. Such a decision requires no further review.

First, the Sixth Circuit determined that Respondent's guilty plea had been involuntary because the unique facts and circumstances surrounding the plea indicated that Respondent never understood the true nature of the charges against him. Among the numerous discrete factual indications cited by the Sixth Circuit were facts directly analogous to the facts this Court relied upon in *Henderson v. Morgan* as well as facts commonly deemed significant to this inquiry among the sister circuits. Specifically, Respondent suffers from diminished mental capacity, as did the Respondent in *Henderson v. Morgan*. 426 U.S. at 647; *see also Gaddy v. Linahan*, 780 F.2d 935, 944 (11th Cir. 1986). In addition, the Sixth Circuit felt compelled to point out that defense counsel's performance likely had been constitutionally ineffective, despite the fact that this issue was not even before the court. *See, e.g., Allen v. Mullin*, 368 F.3d 1220, 1242 (10th

Cir. 2004); *Gregory v. Solem*, 774 F.2d 309, 316 (8th Cir. 1985). Most importantly, however, the Sixth Circuit's thorough exegesis of the plea proceedings indicates that Respondent simply never understood the true nature of the charges against him. When these facts are reviewed under the standards this Court has established for reviewing a guilty plea only one conclusion is appropriate, the conclusion the Sixth Circuit reached.

Second, the Sixth Circuit concluded that the prosecution violated Respondent's due process rights when it secured two convictions based on wholly inconsistent theories. In Respondent's case, the state secured a guilty plea and ultimately a death sentence by arguing that Respondent was the sole shooter of Mary Jane Stout. Then, in seeking a conviction of Respondent's accomplice, Wesley, the same prosecutor argued before a jury that Wesley was the sole shooter of Mary Jane Stout. The Sixth Circuit, consistent with this Court's precedent and the decisions of a number of circuit courts, concluded that the prosecution's blatant manipulation of the evidence was inconsistent with this Court's overriding concern with justice of finding guilt. This decision was fair and just and does not present a legal issue worthy of this Court's attention.

REASONS TO DENY THE PETITION

I. The Sixth Circuit's decision holding respondent's guilty plea involuntary is entirely consistent with *Henderson v. Morgan* as well as the developing trends among the circuits, and represents the type of fact-intensive decision this court routinely considers inappropriate for certiorari.

This Court has previously held that a guilty plea should be considered involuntary if the defendant did not understand the relation of the admitted facts to the law at the time of the plea. *Boykin v. Alabama*, 395 U.S. 238, 243 n. 5 (1969). In addition, the requisite level of understanding must include "real notice of the true nature of the charge against him." *Henderson v. Morgan*, 426 U.S. 637, 644 (1976). For the defendant to understand the "true nature of the

charge," he must actually understand each of the requisite elements; a mere recitation of the charge will not satisfy this requirement under most circumstances. *Id.* at 645-46. In Respondent's case, after an exhaustive, fact-intensive review of the record, the Sixth Circuit determined that these requirements had not been satisfied; therefore, Respondent's guilty plea had been entered involuntarily. The Sixth Circuit's decision draws on ample support from both the facts and circumstances surrounding the guilty plea, the relevant precedents of this Court, and the application of these precedents in the sister circuits. Thus, Petitioner's attempts to characterize the Sixth Circuit's decision as either a maverick outlier, or the vanguard of a developing split are not supported by either the facts or the law. The Sixth Circuit's decision rests on a deep factual bed-rock, and it is entirely consistent with the relevant legal standards.

The Sixth Circuit conducted an exhaustive review of the facts and circumstances surrounding Respondent's guilty plea. The court noted that Respondent had been charged with a crime that required intent and that the state proffered only a single theory of intent based upon the assertion that Respondent was the shooter. However, Respondent had continually professed that he did not shoot the victim, a position the state later proved in the subsequent trial of his accomplice. *Stumpf v. Mitchell*, 367 F.3d 594, 600-601, 611 (6th Cir. 2004). Given the nature of the charge, and the fact that Respondent had always maintained he was innocent of the actual shooting, the court undertook a careful review of the plea proceedings to determine whether Respondent demonstrated a true understanding of the charges against him. *Id.* at 602-07. It should be noted that, as in *Henderson*, this review required particular care given Respondent's diminished mental capacity. *Id.* at 605. The court began its review by quoting, in its entirety, the prosecutor's account of the plea agreement. *Id.* at 602-03. The court commented that the prosecutor offered only an unclear and confused account of the plea agreement, failings which

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were only compounded when Judge Henderson asked Respondent to verify the prosecutor's explanation of the agreement without attempting to ascertain whether Respondent actually understood that explanation. *Id.* The court then proceeded to examine the entire plea colloquy that followed. *Id.* at 603-07. According to the court's examination of the colloquy transcript, which the decision quotes in its entirety, "[n]owhere does the court explain the elements, or even read the charges as listed in the indictment." *Id.* at 605. More importantly, the court determined that Respondent never received notice that the charge required "specific intent," let alone what a finding of "specific intent" would necessarily include. *Id.* at 605 n.4.

As the court continued its point by point analysis of the record, it discovered a radical misunderstanding between Respondent and the court, an understanding which remained uncorrected throughout the proceedings. This misunderstanding first appeared when Judge Henderson questioned Respondent about the rights he would surrender if he pled guilty. *Id.* at 605-06. The Sixth Circuit determined that this exchange indicated that Respondent believed he would still be afforded the opportunity to present his account of the crime, an account that has never included himself as the shooter. *Id.* According to the Sixth Circuit, Respondent's consistent position on this point should have indicated to all parties concerned that "the defendant did not wish to concede the state's version of the facts." *Id.* at 606. For the Sixth Circuit, the fact that Respondent believed that his plea did not require him to admit to the intentional shooting of the victim comes through loud and clear in the following exchange:

> JUDGE HENDERSON: Are you in fact guilty of court one with specification one and specification four?
> STEPHENS (Counsel for Respondent): One moment, Your Honor. *Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of his right to present evidence at a later time relative to his conduct, but he'll respond to that.*

Id. at 606 (emphasis in original). Judge Henderson responded to this simply by noting that Respondent would be permitted to present evidence at the mitigation hearing. *Id.* The Sixth Circuit concluded that Judge Henderson "completely miss[ed] the clear implication that despite his admission of guilt, Stumpf was concerned about preserving his ability to contest the state's account of his actions." *Id.* at 607. The court further supported this conclusion with sections of defense counsel's argument at the evidentiary hearing, which also directly contradicted the prosecutor's version of events. *Id.* Indeed, Respondent never altered his account of the crime, nor did he waiver in his belief that he was not pleading to a crime inconsistent with that account. Based on its extensive review of the facts, the Sixth Circuit concluded that Respondent's position was entirely inconsistent with the charge to which he pled guilty. *Id.* This radical disconnect, in turn, rendered Respondent's guilty plea involuntary.

The Sixth Circuit concluded that the specific facts and circumstances surrounding Respondent's guilty plea rendered it involuntary according to the dictates of *Boykin* and *Henderson*. *Id.* at 608-10. Specifically, the court held that the disconnect between the charge and its elements and Respondent's account of the crime and belief about what role that account would play in the process clearly indicated that Respondent never possessed an understanding of the law in relation to the facts. *Id.* at 608. Further, the facts clearly indicated that Respondent understood neither the nature of the charge against him, nor the full consequences of his guilty plea. Such a guilty plea is involuntary according to *Boykin* and *Henderson*; therefore, the Sixth Circuit granted relief on this claim.

The Sixth Circuit's decision is consistent with *Henderson*. As in *Henderson*, 426 U.S. at 645-46, the facts indicate that Respondent pled guilty to a charge despite the fact that he clearly misunderstood the nature of that charge. More specifically, as in *Henderson*, the record clearly

indicates that no one ever sufficiently explained the elements of the charge to Respondent. *Id.* To reach this decision, the Sixth Circuit examined the facts and determined that defense counsel's assertion that it had explained the charge could not be afforded any real weight given the fact that Respondent himself continued to request the opportunity to relate his own account of the crime, an account which completely contradicted the charge. The Sixth Circuit also decided not to give any real weight to counsel's representations because of the many indications that Respondent's counsel was constitutionally ineffective.[1] In addition, the Sixth Circuit specifically noted that Respondent "has a low IQ and has been found to be mentally and emotionally immature." *Stumpf*, 367 F.3d at 605. Once again, this reflects the unique facts that were present in *Henderson*, 426 U.S. at 647. Thus, the Sixth Circuit's decision amounts to nothing less than the application of the same legal principles found in *Henderson* to substantially the same facts.

The Sixth Circuit's decision also reflects the consensus developing among the sister circuits as to which facts are most relevant to reviewing a guilty plea. Petitioner attempts to point to cases from the Eighth and Tenth Circuits as evidence of a developing split, however, these cases merely present cases lacking the essential factual elements present in Respondent's case. In *Gregory v. Solem*, 774 F.2d 309, 315-316 (8th Cir. 1985), the Eighth Circuit refused to find a guilty plea involuntary and specifically noted that unlike *Henderson*, and unlike Respondent's case, the defendant in *Gregory* enjoyed effective counsel and did not suffer from diminished mental capacity. In *Allen v. Mullin*, 368 F.3d 1220, 1242 (10th Cir. 2004), the Tenth Circuit also refused to find a guilty plea involuntary in large part because the facts in the record indicated that the defendant received effective counsel. However, in *Gaddy v. Linahan*, 780

[1] Ineffective assistance of counsel was not raised as an independent claim; however, the Sixth Circuit devoted several paragraphs to the multiple errors that "would manifestly constitute ineffective assistance." *Stumpf*, 367 F.3d at 610

F.2d 935, 945 (11th Cir. 1986), the Eleventh Circuit held a guilty plea involuntary and specifically noted that the defendant suffered from diminished mental capacity and was illiterate. The court argued that the defendant's condition required a more involved explanation of the charges than the record indicated he received. *Id.* Thus, these cases do not point to an emerging split in the circuits, as Petitioner alleges; rather, these cases simply present examples of separate courts applying the same basic legal standards to varying fact patterns. Indeed, what all these cases really demonstrate is that whether a guilty plea was involuntary presents a question that depends entirely upon the facts.

The Sixth Circuit's decision relies upon an exhaustive analysis of the facts and a meticulous application of the relevant law to those facts. Indeed, this Court routinely denies *certiorari* to fact-intensive cases precisely because they are more properly handled at the lower court level. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 456-57 (1995) (Scalia, J. dissenting), citing *United States v. Johnston*, 268 U.S. 220, 227 (1925). This is just such a case. The Sixth Circuit reviewed all of the relevant facts and held Respondent's guilty plea involuntary according to the guidelines established by this Court's jurisprudence. Such a decision offers nothing for review.

II. The Sixth Circuit's decision that the prosecution secured successive convictions based on inconsistent, irreconcilable theories was correctly reached and is consistent with this court's precedent.

This Court's review of the Sixth Circuit's decision finding a due process violation is inappropriate because Respondent is nonetheless entitled to habeas relief on his claim that his guilty plea was invalid. A decision by this Court on the state's second question presented, therefore, would not change the outcome of the case.

In its well-reasoned decision, the Sixth Circuit concluded that Respondent's due process rights were violated when the prosecutor used inconsistent, wholly irreconcilable theories to

prosecute Respondent and his accomplice, Wesley. *Stumpf*, 367 F.3d at 618. As the Sixth Circuit stated, this conclusion is consistent with this Court's precedent as well as the decisions of other circuit courts that have addressed the issue. *Id.* at 611-12. At least two other circuit courts have concluded that the use of inconsistent, irreconcilable theories to secure convictions against two or more defendants for prosecutions for the same crime violates the due process clause. *Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045, 1058-59 (9th Cir. 1997) (en banc). *See also Nichols v. Scott*, 69 F.3d 1255, 1271 (5th Cir. 1995) (addressing the issue but holding that the prosecutor's theories were not inconsistent); *Drake v. Kemp*, 762 F.2d 1449, 1470 (11th Cir. 1985) (en banc) (Clark, J., specially concurring) (concluding that the prosecutor's use of totally inconsistent theories violated the Fourteenth Amendment).

In addition, the Sixth Circuit reached a fair and just conclusion with respect to this issue. The state incorrectly asserts that Stumpf's claim "amounts to a claim that he has a right to have the State vacate his guilty plea to the charged offense simply because evidence later comes to light that might have been helpful to him had he gone to trial." (Brief for the Petitioner at 18). Here, the state grossly understates the nature of the inconsistencies in the prosecutor's case. As the Sixth Circuit concluded, the issue involved more than merely newly-discovered evidence. That court concluded that the prosecutor's statements in support of the conviction and death sentence of Respondent were "irreconcilably inconsistent with those made by the very same prosecutor at Stump's plea hearing." *Stumpf*, 367 F.3d at 613. Therefore, it was the prosecutor's manipulation of the evidence that caused the due process violation. At Respondent's guilty plea hearing, the prosecutor stated:

> Believing that he had killed Mr. Stout, Stumpf [then] turned the same chrome colored Raven automatic pistol upon Mary Jane Stout as she sat on the bed and

> shot her four times. Three times in the left side of the head and neck and one time in the wrist; obviously in order not to leave anyone available to identify him.
>
> Then, at Wesley's trial, the same prosecutor argued before the jury:
>
> Believing he had killed Mr. Stout, [Stumpf] pitched the gun aside and left the immediate area back the hallway down the steps to the basement. At that point [Wesley,] whose own gun was jammed, picked that chrome colored Raven up and Mrs. Stout sat helplessly on her bed, shot her four times in order to leave no witnesses to the crime.

Id. Thus, the prosecutor clearly argued in each proceeding that the defendant in that proceeding killed Mary Jane Stout. By using such methods to secure convictions, the prosecutor violated his constitutional and ethical duties to seek justice. As this Court has stated, "because the prosecutor is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer ..., it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds*, *Stirone v. United States*, 361 U.S. 212 (1960). The Sixth Circuit decision was therefore consistent with this Court's "overriding concern with the justice of finding guilt." *United States v. Agurs*, 427 U.S. 97, 112 (1976).

Furthermore, this is not a case in which a defendant is simply seeking an undue benefit after a conviction. Since his guilty plea hearing, Respondent has been absolutely consistent in arguing that Wesley, not he, shot and killed Mary Jane Stout. *Stumpf*, 367 F.3d at 607. On the other hand, the state has constantly shifted theories to pursue and then maintain inherently inconsistent convictions. The Sixth Circuit opinion recognized this, pointing out that the state shifted its position during oral arguments before the panel. *Id.* at 614. During oral arguments, the state argued that Eastman's testimony that Wesley was the actual shooter was "completely unreliable." *Id.* The Sixth Circuit found this position "just short of astounding," because the

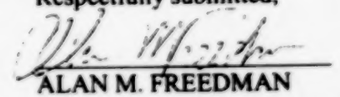
state had based its proof of specific intent solely on Eastman's testimony that Wesley was the actual shooter. *Id.*

In sum, the Sixth Circuit's decision corrects an injustice that would have occurred from a defendant being convicted and sentenced to death for the exact conduct that the prosecutor later attributes to another defendant. The writ of certiorari should be denied in this case.

CONCLUSION

For the reasons described above, the petition for writ of certiorari should be denied.

Respectfully submitted,



ALAN M. FREEDMAN
One of Respondent's Attorneys

ALAN M. FREEDMAN
Counsel of Record
CAROL R. HEISE
Midwest Center for Justice
831 Main Street
Evanston, IL 60201
(847) 492-1563 (ph)
(847) 492-1861 (fax)

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CERTIFICATE OF SERVICE

Please take notice that on December 10, 2004, I served Diane Richards Brey, Deputy Solicitor, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, by sending three (3) copies of the above and foregoing Brief in Opposition to Writ of Certiorari and Motion for Leave to Proceed *In Forma Pauperis*, via Federal Express.

Respectfully Submitted,

_____
ALAN M. FREEDMAN
One of Respondent's Attorneys

ALAN M. FREEDMAN
Counsel of Record
CAROL R. HEISE
Midwest Center for Justice
831 Main Street
Evanston, IL 60201
(847) 492-1563 (ph)
(847) 492-1861 (fax)

JAN 7 PAGE 48

(2)

Supreme Court, U.S.
FILED
DEC 20 2004
OFFICE OF THE CLERK

No. 04-637

IN THE SUPREME COURT OF THE UNITED STATES

BETTY MITCHELL, Warden, *Petitioner*,

v.

JOHN DAVID STUMPF, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
*Counsel of Record
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
FRANKLIN E. CRAWFORD
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

A. The Sixth Circuit's decision exacerbates a circuit split regarding *Henderson v. Morgan*, and this case presents the proper vehicle for resolving the conflict 2

B. Stumpf fails to address either the conflict between the panel's decision and this Court's decision in *United States v. Ruiz*, or the panel's decision and the Fifth Circuit's decision in *Nichols v. Scott* 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Allen v. Mullin,
368 F.3d 1220 (10th Cir. 2004) 3, 6, 8

Gregory v. Solem,
774 F.2d 309 (8th Cir. 1985) 3, 5, 6, 7

Henderson v. Morgan,
426 U.S. 637 (1976) 1, 2–3, 7

Moore v. Armontrout,
928 F.2d 288 (8th Cir. 1991) 4, 5

Nichols v. Scott,
69 F.3d 1255 (5th Cir. 1995) 1, 9

Smith v. Groose,
205 F.3d 1045 (8th Cir 2000) 9

Stumpf v. Mitchell,
367 F.3d 594 (6th Cir. 2004) 5, 6, 7, 8

Thompson v. Calderon,
120 F.3d 1045 (9th Cir. 1997) 9

United States v. Ruiz
536 U.S. 622 (2000) 1, 8

INTRODUCTION

The petition showed that the decision below warrants review for two reasons. First, the decision exacerbates a circuit split regarding the framework announced in *Henderson v. Morgan*, 426 U.S. 637 (1976), for assessing whether a defendant's attorney adequately explained a plea—an issue that could arise in each of the hundreds of thousands of criminal cases every year in which the defendant pleads. Second, the Sixth Circuit's due process holding, predicated on the use of allegedly inconsistent evidence at a later trial of Stumpf's accomplice, is inconsistent with this Court's decision in *United States v. Ruiz*, 536 U.S. 622 (2002), and creates a direct conflict with the Fifth Circuit's decision in *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995).

In response, Stumpf attempts to sidestep the first issue. He asserts that the differing interpretations of *Henderson* among the Sixth, Eighth, and Tenth Circuits arise not from a dispute as to legal rules, but only differences among the facts in the various cases. See Stumpf Opp. Br. at 2–7. But that understanding is simply wrong. As we pointed out in our opening brief, two circuits (the Eighth and Tenth) both hold that under *Henderson*, the defendant bears the burden of establishing that his attorney did not adequately explain the plea, and that the defendant cannot rely on ambiguous evidence to overcome his express statement on the record that he was so informed. In the Sixth Circuit, by contrast, that is not so. The court expressly placed the burden of proving adequate explanation on the State. And then, despite Stumpf's express representation that his attorney had explained the plea, the court relied on decidedly ambiguous evidence to show the contrary. Thus, precisely the same record would lead to different results in these circuits. And, given the number of pleas each year, this lack of certainty presents an issue of paramount concern.

Stumpf's argument on the due process issue is equally flawed. Rather than addressing Petitioner's arguments, Stumpf asserts only that his case "corrects an injustice." *Id.* at 10. But Stumpf's personal sense of "justice" cannot reconcile the Sixth Circuit's decision below with this Court's decision in *Ruiz* or the Fifth Circuit's decision in *Nichols*. The Sixth Circuit's clear failure to follow this Court's mandates warrants certiorari, or perhaps even summary reversal.

A. The Sixth Circuit's decision exacerbates a circuit split regarding *Henderson v. Morgan*, and this case presents the proper vehicle for resolving the conflict.

1. In his opposition brief, Stumpf does not identify, much less reconcile, the conflicting *legal rules* developed by the circuits in the wake of this Court's holding in *Henderson v. Morgan*. The differing legal principles matter most, yet go wholly unaddressed in the respondent's focus on irrelevant factual details.

In *Henderson*, the Court recognized that in plea-withdrawal cases, the Court presumes that an attorney adequately explains the elements of the charge to his clients, especially when the attorney affirms as much on the record. This Court articulated that principle in holding that:

> [n]ormally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to *presume* that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

426 U.S. at 647 (emphasis added). Applying that principle, the *Henderson* Court found that the case there was "unique" "because the trial judge *found as a fact* that the element of intent was not explained to respondent." *Id.* (emphasis added). It was this factual finding, coupled with Morgan's "*unusually* low mental capacity," that compelled the Court to hold that Morgan's plea was deficient. *Id.* (emphasis added).

As the petition demonstrates, other courts, including the Eighth and Tenth Circuits, have properly concluded that *Henderson* places the burden upon the convicted defendant to show that he was not advised of a crucial element of the offense to which he pled guilty. See Pet. at 13–18. Indeed, the *Henderson* presumption—that defense counsel explained the charge to the defendant—applies even when the defense attorney has not stated on the record that he explained the elements of the offense to his client. See *Henderson*, 426 U.S. at 647; *Gregory v. Solem*, 774 F.2d 309, 313–16 (8th Cir. 1985).

The Tenth Circuit's recent decision in *Allen v. Mullin*, 368 F.3d 1220 (10th Cir. 2004), is illustrative. There, the court required a defendant to: "(1) show that the [intent] element was a critical element of [the charge]; (2) *overcome the presumption that his attorney explained this element to him at some other time prior to his guilty plea*; and (3) demonstrate that, prior to his guilty plea, he did not receive notice of this element from any other source." *Id.* at 1241 (emphasis added; alterations in original; internal quotation marks omitted). Similarly, the Eighth Circuit places the burden of demonstrating a lack of adequate explanation firmly upon the habeas petitioner, regardless of whether or not there is a statement on the record by defense counsel confirming that he advised his client regarding the charge. In *Gregory v. Solem*, 774 F.2d 309 (8th Cir. 1985), the Eighth Circuit rejected an involuntary plea claim when the defendant

"offered no evidence to rebut [the] presumption that his counsel explained to him the nature of the [] offense," *id.* at 316.

Indeed, *Moore v. Armontrout*, 928 F.2d 288 (8th Cir. 1991)—a case Stumpf fails to cite, much less explain—demonstrates the stark difference between the Eighth Circuit's approach and the one adopted below. The Eighth Circuit in *Moore* recognized "[t]he *Henderson* presumption that counsel explained the nature of the charge to the defendant," which gave "strong support" to "a specific finding of fact [by the state court] that the nature of the offense was fully understood." *Id.* at 293 (quoting *Gregory*, 774 F.2d at 315). And the *Moore* court relied on the plea colloquy described below—a colloquy virtually identical to the one Stumpf had here—as further evidence that the plea was voluntary:

> [The defendant] responded affirmatively when asked if he had discussed the charges with his attorney, if he was satisfied that his attorney had all the necessary facts to give adequate advice, if he had enough time to discuss the charges with his attorney, if he had been advised of his legal rights, if he was satisfied with the services of his attorney, and if he understood the consequences of a guilty plea and the range of punishment for the crimes to which he was pleading guilty.

Id. at 292. The court "refused to interpret *Henderson* broadly" and rejected Moore's claim. *Id.* Unlike the Sixth Circuit panel majority below, the Eighth Circuit in *Moore* did not place the burden on the State to provide extrinsic evidence to support the plea.

The Sixth Circuit below demonstrated a sharply different view of *Henderson*'s legal standards. Instead of applying the

Henderson presumption and requiring the defendant to prove otherwise, the panel did the exact opposite. And, rather than relying on the state trial court's finding of fact that Stumpf's plea was knowing and voluntary, the court below simply glossed over it. See App. 225a, 258a–59a. In fact, the panel engaged in its own de novo weighing of the facts, and in doing so it placed the burden *on the prosecution* to prove by extrinsic evidence that the plea was adequately explained. The court held that despite defense counsel's and Stumpf's assurances on the record that counsel had explained the charges to Stumpf, "the *state* bears the burden of showing the plea was voluntary, knowing and intelligent," and "the *state* has presented no *extrinsic evidence* to counter the record of the proceedings [below]." *Stumpf v. Mitchell*, 367 F.3d 594, 609 (6th Cir. 2004), App. 30a (emphasis added). The Sixth Circuit's insistence that it is the State that bears the burden of proof on adequate explanation, rather than the defendant, cannot be reconciled with the approach adopted in the Eighth and Tenth Circuits.

2. Stumpf's only response is that these divergent results merely reflect different facts, see Stumpf Opp. Br. at 6–7—but that argument is demonstrably wrong. Had the Eighth Circuit been presented with the record below here, it would have *rejected* Stumpf's claim. The Eighth Circuit would have begun with the assumption that Stumpf's counsel informed him of the elements, and it would have then recognized that the record here bolsters that conclusion. *Moore*, 928 F.2d at 292. Specifically, Stumpf's counsel confirmed on the record that he "informed [his] client of the elements of the offenses with which he [was] charged," *Stumpf*, 367 F.3d at 604, App. 19a, and Stumpf acknowledged on the record of the plea hearing that he "heard the questions . . . put to [his] attorneys," and that his "attorneys [had] informed and advised [him] as they say they have." *Id.* at 20a. The Eighth Circuit then would have required the *defendant* to *disprove* the presumption of

adequate explanation. *Gregory*, 774 F.2d at 316 (rejecting an involuntary plea claim when the defendant "offered no evidence to rebut [the] presumption that his counsel explained to him the nature of the [] offense"). Likewise, the Tenth Circuit would require the *defendant* to "overcome the presumption that his attorney explained [an] element to him at some other time prior to his guilty plea," *Allen*, 368 F.3d at 1241, something quite different than requiring the *State* to present "extrinsic evidence to counter the record of the proceedings [below]." *Stumpf*, 367 F.3d at 609, App. 30a. Here, as the record was devoid of any such evidence, courts in the Eighth and Tenth circuits would have rejected Stumpf's claim, while the court below instead upheld it. This stark contrast belies Stumpf's attempts to explain the conflict away on factual grounds.

And, in any event, Stumpf has failed to show that the records in these other cases are even materially different from Stumpf's; thus further undercutting his claims that the split merely reflects factual differences. For example, he asserts that *Gregory* was different from his case for two reasons: (1) there the defendant had effective assistance in the plea hearing, while Stumpf did not, and (2) the defendant there was "a person of at least average intelligence," *Gregory*, 774 at 315 n.5, while Stumpf is ~~not~~, Stumpf Opp. Br. at 6. With regard to the first, however, while it is true that the *Gregory* court stated that Gregory had effective assistance of counsel, it apparently reached that conclusion based solely on Gregory's own testimony. 774 F.3d at 316 (Gregory "stated at the post-conviction hearing that he was satisfied with his representation and was not alleging ineffective assistance of counsel. The fact that the plea bargain was made through and with effective assistance of counsel is strong evidence of the voluntary nature of the plea."). But here, just as in *Gregory*, Stumpf testified at the plea hearing that he was satisfied with the performance of his attorneys. *Stumpf*, 367 F.3d at 604, App. 30a (Stumpf answered "[y]es, sir" in

response to the trial court's question: "Are you satisfied with the services which [your attorneys] have performed for you?"). Moreover, Stumpf concedes that "[i]neffective assistance of counsel was not raised as an independent claim." Stumpf Opp. Br. at 6 n.1. Accordingly, the Sixth Circuit's conclusion that trial counsel's alleged errors "would manifestly constitute ineffective assistance," *Stumpf*, 367 F.3d at 610, App. 32a, is just speculation and fails to distinguish this case from *Gregory*.

The *Gregory* court's recognition in a footnote that the defendant was "a person of at least average intelligence," 774 F.3d at 315 n.5, similarly fails to factually distinguish that case from Stumpf's. Unlike the successful defendant in *Henderson*, who had an "*unusually* low mental capacity," 426 U.S. at 647 (emphasis added), the court below held that Stumpf had a "low IQ and has been found to be mentally and emotionally immature," *Stumpf*, 367 F.3d at 605, App. 32a. The district court itself had made no finding concerning Stumpf's mental capacity, and the only evidence on the issue came from Stumpf's expert who testified that Stumpf had an "IQ of 80, placing him at the lowest end of the *low average* range." D. Ct. Op. at 41 (Feb. 7, 2001); App. 240a (under its "Findings of Fact" heading, the state court noted "[t]he facts show the Petitioner to be of low, but normal, intelligence"). In other words, Stumpf had, at worst, low average intelligence and not the "*unusually* low mental capacity" warranting the judgment reached in *Henderson*. Thus, Stumpf's mental abilities are not so different from Gregory's as to support a different result under *Henderson*, if that case is understood the same way in the two circuits.

Stumpf's attempt to distinguish the Tenth Circuit's *Allen* decision on the grounds that "the record indicated that [Allen] received effective counsel" also fails. Stumpf Opp. Br. at 6. The *Allen* court never addressed the question of whether his counsel was effective in explaining the elements

of the charge. In any event, the critical comparison is between the actions of Allen's attorneys and the actions of Stumpf's attorneys. In both cases, counsel's testimony indicated that they explained the charges to their clients, and both defendants confirmed that their attorney had explained the charges to them. *Allen*, 368 F.3d at 1242; *Stumpf*, 367 F.3d at 604, App. 20a. The comparison between counsel here and in *Allen*, then, proves that factually, they received the same assistance, but the courts arrived at opposite results.

As there are no material factual differences among the cases comprising the circuit split, the differing judgments can only be explained by the respective circuits' different legal interpretations of *Henderson*. These starkly differing interpretations warrant immediate review, and this case is an ideal vehicle for undertaking it.

B. Stumpf fails to address either the conflict between the panel's decision and this Court's decision in *United States v. Ruiz*, or the panel's decision and the Fifth Circuit's decision in *Nichols v. Scott*.

This Court's recent decision in *United States v. Ruiz*, 536 U.S. 622 (2002)—another case that Stumpf fails to cite, much less explain—forecloses the result reached by the court below concerning Stumpf's due process claim. In *Ruiz*, the Court held that the Constitution does not require a prosecutor to disclose exculpatory impeachment information before a defendant enters a plea agreement. *Id.* at 633. It follows that if a plea-bargaining defendant had no right to receive impeachment evidence inconsistent with his guilt, he cannot later claim a constitutional violation because the prosecution later used evidence that was inconsistent with Stumpf's own plea. This is especially true when, as here, the inconsistent evidence did not even exist at the time of the plea hearing. As the Court recognized in *Ruiz*, "impeachment information is special in relation to the *fairness of a trial*, not in respect to

whether a plea is *voluntary*." *Id.* at 629 (emphasis in original). Any fairness notions related to the evidence used to convict Stumpf's accomplice Wesley go only to the fairness of a trial, which Stumpf waived by pleading guilty. And while it is true that other circuits have found due process violations for inconsistent prosecution theories, those cases did not involve the creation of the right in the context of plea hearings, only full criminal trials. See *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997), *vacated on other grounds*, 523 U.S. 538 (1998).[1]

The panel decision also conflicts with the Fifth Circuit's decision in *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995), involving separate trials for two men who each fired shots at a store clerk. The prosecutor argued that each particular defendant fired the fatal bullet. The district court granted habeas relief to the defendant with the later trial, but the Fifth Circuit reversed the holding (one remarkably similar to the Sixth Circuit's holding below) that "the due process boundary upon prosecutorial conduct and the appearance of basic fairness . . . constitutionally estopped [the state] from obtaining a fact finding in one trial and seeking and obtaining an inconsistent fact finding in another trial." *Id.* at 1268 (emphasis and internal quotation marks omitted). The court held that "allowing persons to claim collateral estoppel benefits of an adjudication to which they were strangers can hardly be considered as mandated by historic concepts of fundamental fairness or due process." *Id.* at 1270; see also *id.* at 1272 ("there is no indication in the authorities that

[1] The *Thompson* majority did not hold that inconsistent theories created a due process violation, but instead resolved the case on ineffective assistance of counsel grounds. 120 F.3d at 1051–55. Several judges participating in the *en banc* panel in *Thompson*, however, took the view that inconsistent prosecution theories violated due process principles. *Id.* at 1063–64 (Tashima, J., joined by Thomas, J., concurring), 1071 (Kozinski, J., joined by Nelson, J., dissenting).

[estoppel] is constitutionally mandated"). And, in Stumpf's case, Stumpf was the first of the two codefendants to be found guilty, making the Sixth Circuit's holding even more incongruous.

Instead of responding to these specific arguments, Stumpf only claims that the panel's decision "is consistent with this Court's precedent" (although he does not cite anything of relevance) and that "the Sixth Circuit reached a fair and just conclusion." Stumpf Opp. Br. at 8. Stumpf's exclusive focus on the perceived equities, as well as his failure to even respond to the Petitioner's legal arguments, offer nothing to dissuade the Court from granting the petition and addressing the Sixth Circuit's flawed due process analysis.

CONCLUSION

For the above reasons, and those in the Petition for Certiorari, the petition should be granted, or in the alternative, the judgment below should be summarily reversed.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
*Counsel of Record
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
FRANKLIN E. CRAWFORD
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioners

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(3)

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No. 04-637

In The Supreme Court Of The United States

MARGARET BRADSHAW, Warden,

Petitioner,

v.

JOHN DAVID STUMPF,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

ALAN M. FREEDMAN*
**Counsel of Record*
CAROL R. HEISE
Midwest Center for Justice
831 Main Street
Evanston, IL. 60202
847-492-1563
847-492-1861 fax
Counsel for Respondent

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
**Counsel of Record*
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
FRANKLIN E. CRAWFORD
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioners

PETITION FOR WRIT OF CERTIORARI FILED: NOVEMBER 8, 2004
CERTIORARI GRANTED: JANUARY 7, 2005

TABLE OF CONTENTS

Selected Docket Entries **Page**

Stumpf v. Anderson, No. 1:96-CV-0068-GCS-TPK
(U. S. District Court for the Southern District of Ohio
(Cincinnati)) 1

Stumpf v. Mitchell, No. 01-3613
(U. S. Court of Appeals for the Sixth Circuit) 7

Lower Court Opinions

Stumpf v. Anderson, No. C-1-96-668
(U.S. District Court for the Southern District
of Ohio, Eastern Division), Judgment,
Opinion and Order of February 7, 2001 9

Excerpt from Stumpf's 6th Circuit Brief,
at pages 63–73 108

Items from Stumpf's State Court Trial

Indictment against Stumpf, District Court
Record No. 13 (R.13), Return of Writ,
at Ex. A 117

State's July 1985 response to Stumpf's motion
to withdraw guilty plea, R.13, at Ex. J 122

Transcript Excerpts from Stumpf's Trial

Transcript of September 17, 1984 plea
hearing, R.13, Transcript of 9/17/84 to 9/24/84 128

Transcript of defense motions after hearing on factual basis for the plea, and Court ruling, R. 13, Transcript of 9/17/84 to 9/24/84 156

Transcript of arguments of counsel after Stumpf's mitigation (sentencing) hearing, and decision, R. 13, Transcript of 9/17/84 to 9/24/84 172

Excerpt from transcript of October 1, 1985 hearing on Stumpf's motion to withdraw guilty plea, R. 13, Transcript of October 1, 1985 203

Transcript Excerpts from Clyde Daniel Wesley's Trial

Transcript of State's opening statement, R. 33, Transcript of Wesley Trial, April–May 1985 215

Testimony of James Eastman (Wesley's cellmate), R. 33, Transcript of Wesley Trial, April–May 1985 231

Transcript of State's closing arguments (initial and rebuttal) at guilt phase of Wesley's trial, District Court Record No. 42, Transcript of Wesley trial, April–May 1985 265

Exhibits (from Stumpf's State Post-Conviction Review Petition)

Affidavit of John David Stumpf, R. 13, Ex. KK (Petition to Vacate or Set Aside Sentence), at Ex. MM 301

Affidavit of Charlotte Gilbert, R. 13, Ex. KK, at Ex. E 305

Affidavit of Scott P. Kenney, R. 13, Ex. KK, at Ex. F 309

Affidavit of Lesa Wood, R. 13, Ex. KK, at Ex. M 312

[The following reproduction includes
only selected docket entries.]

United States District Court
For The Southern District Of Ohio (Cincinnati)
Civil Docket For Case #: 1:96-CV-00668-GCS-TPK

Stumpf v. Anderson

DOCKET ENTRIES

Filing Date	#	Docket Text
11/16/1995	1	APPLICATION by petitioner John David Stumpf to proceed in forma pauperis.
11/16/1995	2	PETITION FOR WRIT OF HABEAS CORPUS (referred to Mag. Judge Terence P. Kemp).
11/20/1995	3	MOTION by petitioner John David Stumpf for appointment of counsel.
01/24/1996	4	ORDER by Lesley Brooks Wells granting motion for appointment of counsel [3-1], granting motion to proceed in forma pauperis [1-1].

01/26/1996	5	CJA (30) Appointing atty for petitioner Joh[n] David St[u]mpf. David L Doughten and Carla M. Tricarichi.
03/13/1996	6	ORDER OF TRANSFER by Judge Lesley B. Wells - Case tranferred to SDO East Div - Columbus.

* * *

10/08/1996	13	RETURN OF WRIT by respondent Carl Anderson to habeas corpus petition [2-1] (treated as motion to dismiss).

* * *

11/09/1999	20	MEMORANDUM, OPINION, AND ORDER: by Judge George C. Smith waiving Claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, Claim 3 and that portion of the second of petitioner's fifth claims; claim 1.17 an[d] that portion of the fifth claim which raises ineffective assistance of counsel for failing to develop the record as to the involuntary nature of petitioner's guilty plea have not been waived of the habeas corpus petition.
03/09/2000	21	ATTORNEY SUBSTITUTION: terminating attorney Stuart W Harris for Carl Anderson, attorney Sharon A McClellan for Carl Anderson and substituting attorney Jon William Oebker, Charles L Wille.

09/11/2000	22	ORDER by Mag. Judge Terence P. Kemp Case mgmt ddl /supply briefs due 10/1/00 by petitioner & respondent each party to file reply brief 10 days after initial suppl brief is filed.
09/29/2000	23	SUPPLEMENTAL BRIEF FILED by respondent Carl Anderson regarding the impact of Smith v. Goose in response to Scheduling order Case mgmt ddl /supply briefs due 10/1/00 by & respondent [22-1], regarding order [22-2].
10/02/2000	24	BRIEF FILED by petitioner John David Stumpf regarding Scheduling order Case mgmt ddl /supply briefs due 10/1/00 petitioner & respondent [22-1], regarding order [22-2].
10/02/2000	25	Supplement by respondent Carl Anderson re brief.
10/17/2000	26	REPLY BRIEF FILED by respondent Carl Anderson regarding the impact of Smith v. Goose Scheduling order Case mgmt ddl /supply briefs due 10/1/00 by & respondent [22-1], regarding order [22-2].
02/07/2001	27	OPINTON AND ORDER: by Judge George C. Smith finding that the Petitioner's remaining claims are without merit. All of Petnr's claims are DENIED and this action is

		DISMISSED. dismissing case ; Petnr is directed to file with this Court, in accordance with his suppl brief filed 10/2/00 and w/i 30 days, the transcript of Clyde Daniel Wesley's trial; petnr motion to file a suppl brief on merits of petnr's claims is DENIED as moot
02/07/2001	28	JUDGMENT: entered denying all of petitioner's claims and dismissing this action dismissing case.
02/07/2001		Copy of Order/Jgmt mailed to U.S. Supreme Court, US Appeals Court, Ohio Public Defender, Ohio Attorney General and Warden.
02/15/2001		Mail Returned, addressed to Carla Tricarichi
02/22/2001	29	MOTION by petitioner John David Stumpf to alter judgment.
03/14/2001	30	MOTION by petitioner John David Stumpf for leave to [e]xpand the record to include trial transcripts of Clyde Daniel Wesley.
03/15/2001	31	RESPONSE (memo in opposition) by respondent Carl Anderson to petitioner's motion to alter judgment.
04/09/2001	32	ORDER by Mag. Judge Terence P. Kemp granting motion for leave to expand the record to include trial transcripts of Clyde Daniel Wesley.

04/09/2001	33	STATE COURT TRIAL TRANSCRIPT filed by petitioner John David Stumpf(6 volumes).
05/01/2001	34	OPINION AND ORDER by Judge George C. Smith denying motion to alter judgment [28-2] judgment [29-1].
05/30/2001	35	NOTICE OF APPEAL by petitioner John David Stumpf from Dist. Court decision [34-1] of 5/1/01.
05/30/2001		APPEAL FEE unpaid.
05/31/2001		APPEAL NOTIFICATION issued CA.
06/06/2001		RECEIPT OF USCA APPEAL NUMBER - Number Assigned: 01-3613.
07/12/2001	36	OPINION AND ORDER by Judge George C. Smith; petitioner may proceed IFP on appeal.
06/07/2002		RECORD CERTIFIED to USCA 6th: 2 volumes of pleadings and 5 black folders containing state court transcripts and exh; and 1 brown folder containing vol 1 & 2 of state court transcripts.
04/29/2004	37	USCA INFORMATION COPY re [35] Notice of Appeal: it is ordered that the judgment of the district court us reversed and the case remanded for

		further proceedings consistent with the opinion of this court. (Attachments: # 1 Information Copy continued).
04/29/2004	38	USCA JUDGMENT As to[35] Notice of Appeal filed by John David Stumpf: the USCA orders that the judgment of the district court is reversed and the case is remanded for further proceedings consistent with the opinion of this court.
11/24/2004	39	NOTICE FROM U.S. SUPREME COURT re [35] Notice of Appeal: Assignment of Case #04-637
01/14/2005	40	ORDER of USCA for mtn on IFP is granted as to # [35] Notice of Appeal filed by John David Stumpf.
02/04/2005	41	Joint MOTION to supplement the record by Petitioner John David Stumpf, Respondent Carl Anderson.
02/09/2005	42	ORDER granting # 41 Motion to transfer transcript to the United States Court of Appeals for the Sixth Circuit. Signed by Judge Terence P Kemp on 2/09/05.
02/09/2005	43	Remark Mailed transcripts per order #42 to the United States District Court of Appeals Sixth Circuit.

[The following reproduction includes only selected docket entries.]

GENERAL DOCKET
U. S. Court of Appeals for the Sixth Circuit

No. 01-3613

JOHN DAVID STUMPF, Petitioner - Appellant

v.

BETTY MITCHELL, Warden, Respondent-Appellee

DOCKET ENTRIES

Date	Docket Text
6/5/01	Death Penalty Case Docketed, with certificate of appealability pending in District Court. Notice filed by Appellant John David Stumpf. Transcript needed.
	* * *
7/12/01	Copy of District Court Order filed to grant a certificate of appealability.
	* * *
12/11/02	CAUSE ARGUED on 12/11/02.
	* * *

4/28/04	OPINION filed: REVERSED and remanded [01-3613], decision for publication pursuant to local rule 206 [01-3613].
4/28/04	JUDGMENT: REVERSED and remanded.
	* * *
5/12/04	PETITION for en banc rehearing filed by Stephen E. Maher for Appellee Betty Mitchell.
	* * *
8/9/04	ORDER filed denying petition for en banc rehearing.
	* * *
9/9/04	Appellee MOTION filed to stay mandate pending the filing of a writ of certiorari.
	* * *
9/16/04	ORDER filed granting motion to stay mandate.
11/16/04	U.S. Supreme Court notice filed regarding petition for writ of certiorari.
	* * *
1/13/05	U.S. Supreme Court letter filed granting petition for writ of certiorari filed by Betty Mitchell, and motion for leave to proceed in forma pauperis granted. Supreme Court No. 04-637 [01-3613]. Filed in the Supreme Court on 01-07-05.

UNITED STATES DISTRICT COURT
Southern District of Ohio

JUDGMENT IN A CIVIL CASE

JOHN DAVID STUMPF

vs. Case No. C1-96-668

CARL ANDERSON, Warden JUDGE SMITH
Magistrate Judge Kemp

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☒ Decision by Court. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the Opinion and Order of February 7, 2001, all of the Petitioner's claims are DENIED and this action is DISMISSED. Petitioner is DIRECTED to file with this Court, in accordance with the supplemental brief filed on October 2, 2000, (doc.no.24, at 2 n.2) and within thirty days from the date of this Order, the transcript from Clyde Daniel Wesley's trial.

Date: February 7, 2001 Kenneth J. Murphy, Clerk

By: /s/ Peg Lambert
Peg Lambert, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DAVID STUMPF,

Petitioner,

v. Case No. C-1-96-668
JUDGE SMITH
CARL ANDERSON, Warden, Magistrate Judge Kemp

Respondent.

OPINION AND ORDER

Petitioner, a state prisoner sentenced to death by the State of Ohio following his plea of guilty to a charge of capital murder, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. §2254. On November 9, 1999, this Court issued an Opinion and Order finding that the following claims were barred by procedural default: 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, 3, and 5a. This matter is now before the Court on the instant petition, respondent's return of writ, petitioner's traverse, and the state court record for a determination of the merits of petitioner's remaining claims.[1] The facts of this case are set forth in the Opinion and Order of November 9, 1999, and will be repeated here only to the extent needed to provide context for petitioner's merits arguments.

First Claim for Relief

In his first claim for relief, petitioner mounts a

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[1] Also before the Court are supplemental briefs filed by the parties pursuant to an order from this Court dated September 11, 2000. (Order, 09/11/200, doc. no. 22).

general attack on the constitutionality of Ohio's death penalty statute, both on its face and as applied to him. The Court will address only those allegations that were properly presented to the Ohio courts, *i.e.*, claims 1.1, 1.3, 1.5, 1.7, 1.8, 1.9, 1.11, 1.13, 1.15, 1.16, 1.17, and 1.18.[2] To the extent that petitioner might be arguing that the imposition of the death penalty is unconstitutional under all circumstances, the United States Supreme Court has rejected that argument. *Gregg v. Georgia,* 428 U.S. 153 (1976).

1.1 Uncontrolled Discretion of Prosecutors in Indictment Decisions

In the first sub-part of his first claim for relief, petitioner argues that the uncontrolled discretion of prosecutors in indictment decisions allows for arbitrary and discriminatory imposition of the death penalty. *Petition,* at ¶11. This argument finds no support in the law.

Ohio's scheme is not rendered unconstitutional by the discretion that prosecutors enjoy in deciding whom to charge with a capital offense. In fact, the Supreme Court rejected a similar argument in *Gregg* by distinguishing between discretion that is exercised by a sentencing body and discretion that is exercised by various individuals or bodies in earlier stages of the criminal process. In *Gregg,* the petitioner complained that the discretion exercised throughout stages other than the sentencing stage allowed for arbitrary and capricious imposition of the death penalty. Specifically, the petitioner noted that prosecutors had unfettered discretion to select those persons whom they wished to prosecute for a capital offense, that a jury may

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[2] In its previous Opinion and Order, the Court held that the following sub-parts of petitioner's first claim for relief were barred by procedural default: 1.2, 1.4, 1.6, 1.10, 1.12, and 1.14.

choose at trial to convict the defendant of a lesser included offense rather than a crime punishable by death, and that a defendant sentenced to death could have his sentence commuted by the governor and state board of pardons and paroles. The Supreme Court rejected this argument, explaining that:

> [T]he existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman,* in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.

Gregg, supra, 428 U.S. at 199. The fact that a prosecutor has the power not to charge capital felonies does not indicate that the prosecutor exercises his discretion in a standard-less manner that violates the Constitution. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated by factors other than the strength of their case and the likelihood that the jury will recommend death. Petitioner's argument to the contrary is unsupported by controlling law.

1.3 "Felony Murder" Aggravating Circumstance Does Not Narrow Offenders

In the third sub-part of his first claim for relief, petitioner argues that the "felony murder" aggravating circumstance set forth in R.C. §2929.04(A)(7) is duplicative of the general definition of aggravated murder, and

accordingly, does not distinguish capital murderers from other murderers. Petitioner reasons that Ohio's felony murder statutory provisions are constitutionally infirm because, by allowing an aggravating circumstance merely to repeat an element of the offense of aggravated murder, the statutory scheme does not genuinely narrow the class of death-eligible offenders. *Petition* at ¶14. This argument appears to be foreclosed by Supreme Court precedent.

The overriding constitutional concern is that the capital sentencing scheme in question genuinely narrows the class of persons eligible for the death penalty. *Zant v. Stephens,* 462 U.S. 862, 877 (1983). In *Lowenfeld v. Phelps, supra,* 484 U.S. at 236, the Supreme Court concluded, with respect to capital schemes that utilize aggravating factors to narrow the class of death-eligible offenders, that an aggravating factor which merely repeats an element of the crime will withstand constitutional scrutiny, so long as it narrows the jury's discretion. Ohio's scheme does not authorize an automatic, mandatory death penalty for felony murders *without more* -- namely, that the killing be purposeful, and that either the defendant be the principal offender in the aggravated murder or that the aggravated murder have been committed with prior calculation and design.

First, the class of felonies qualifying under felony murder is limited and, on top of that, the killing must be purposeful. Section 2903.01(B) of the Ohio Revised Code, as it existed when petitioner was indicted and convicted, defined the "felony murder" class of aggravated murder as purposely causing the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnaping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

Moreover, assuming the defendant is convicted of aggravated murder as defined above, he is not eligible for the death penalty unless at least one aggravating circumstance is also established beyond a reasonable doubt. One such aggravating circumstance, set forth in R.C. §2929.04(7), exists if the aggravated murder was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnaping, rape, aggravated arson, aggravated robbery, or aggravated burglary, ***and*** either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design. That these felonies overlap with most of the felonies set forth in the "felony murder" class of aggravated murders set forth in R.C. §2903.01(B) does not undermine the ability of the scheme to genuinely narrow the class of death-eligible offenders. Accordingly, the Court is not persuaded that Ohio's felony murder scheme is constitutionally infirm in the manner urged by petitioner. This argument also appears to be foreclosed by the Court of Appeals' decisions in *Scott v. Mitchell,* 209 F.3d 854, 885 (6th Cir.), *cert. denied,* 121 S.Ct. 588 (2000), and *Byrd v. Collins,* 209 F.3d 486, 539 (6th Cir.), *r'ng en banc denied,* 227 F.3d 756 (6th Cir. 2000), *cert. denied,* -- S.Ct. -- , 2001 WL 12722 (January 8, 2001).

1.5 Statute Does Not Require Specific Intent to Kill

In the fifth sub-part of his first claim for relief, petitioner argues that Ohio's statutory scheme is constitutionally infirm for failing to require the conscious desire to kill, or premeditation and deliberation, as the culpable mental state. This omission, petitioner reasons, is tantamount to a mandatory death scheme and effectively shields from judicial review the process of deciding who is to be sentenced to death. *Petition* at ¶16.

The crux of petitioner's argument is that Ohio's death penalty statute does not meet the constitutional prohibition against arbitrary and capricious infliction of the death penalty, in part, because it fails to require the conscious desire to kill or premeditation and deliberation as the culpable mental state. Ohio's scheme is not rendered unconstitutional by the absence of a requirement of premeditation or deliberation, since the Constitution contains no such requirement. *See Enmund v. Florida*, 458 U.S. 782, 790 n.7 (1982). Furthermore, capital punishment in Ohio is authorized only when a defendant has been found guilty of aggravated murder, (which is defined as ***purposely*** causing the death of another, either with prior calculation and design or in conjunction with one or more statutorily-enumerated felonies), and at least one statutorily-defined aggravating circumstance. For all of these reasons, petitioner's argument alleging the lack of specific standards in Ohio's death penalty statutes must be rejected.

1.7 State Not Required To Prove Absence of Mitigating Factors

In the seventh sub-part, petitioner argues that Ohio's death penalty is unconstitutional because the State is not required to prove the absence of mitigating factors and or that death is the only appropriate penalty, which essentially results in a mandatory death penalty scheme. *Petition* at ¶18.

The Constitution does not prohibit states from requiring capital defendants to prove mitigation evidence by preponderance of the evidence, so long as the State's burden of proving aggravating circumstances beyond reasonable doubt is not lessened. *Walton v. Arizona*, 497 U.S. 639, 649-651 (1990)(plurality); *see also Lockett v. Ohio*, 438 U.S. 586, 609 and n.16 (1978)(plurality)(leaving intact the requirement that the defendant prove the existence of mitigating factors by a preponderance of evidence). Further, although the Ohio

Supreme Court has equated the defendant's "burden of going forward" with mitigating evidence with proving that mitigating evidence by a preponderance of the evidence, *see State v. Jenkins*, 15 Ohio St. 3d 164, 171-72 (1984); *see also State v. Stumpf*, 32 Ohio St. 3d 95, 101-102 (1987), the statutory provision gives the defendant "great latitude" in doing so. *See* R.C. §2929.03(D)(1). In sum, it is not *per se* unconstitutional to place on the defendant the burden of proving existence of mitigating factors, and in Ohio, the State still bears the burden of proving beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.

Petitioner's argument that Ohio's death penalty statute is unconstitutional because it does not require the State to prove that death is the only appropriate sentence finds no support in the law. "Appropriateness" of the death penalty describes the individualized sentencing determination that is undertaken after a jury or trial court has concluded that a defendant is eligible for the death penalty. *See Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990); *California v. Ramos*, 463 U.S. 992, 1007 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Under Ohio's capital punishment scheme, appropriateness of the death penalty is determined when the sentencing body, having already found that a defendant convicted of aggravated murder is death-eligible because one or more aggravating circumstances has been proven beyond a reasonable doubt, undertakes a separate review of whether the aggravating circumstances outweigh any mitigating factors. Petitioner has not demonstrated, and it is not otherwise apparent to the Court, that the "appropriateness" review embodied in Ohio's scheme is constitutionally infirm simply because the State is not "required to prove that death is the only appropriate penalty."

1.8 No Method for Proper Weighing of Aggravating and Mitigating Factors

Another constitutional infirmity advanced by petitioner is that no method exists to ensure a proper "weighing and consideration" is accomplished. This, petitioner reasons, devalues the importance of mitigation and tilts the process in favor of death. *Petition* at ¶18.

The Constitution does not require that "numeric weights" be assigned to aggravating circumstances and mitigating factors, or that the aggravating circumstances *substantially* outweigh the mitigation factors, but rather requires only that the sentencer's discretion be directed and limited enough to prevent wholly arbitrary and capricious action. "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." *Tuilaepa v. California*, 512 U.S. 967, 979 (1994); *see also California v. Ramos*, 463 U.S. 992, 1008-1009 n.22 (1983); *Zant v. Stevens*, 462 U.S. 862, 875 (1983); *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). Ohio's scheme sufficiently enumerates specific factors that the sentencer must evaluate, and a general framework for that evaluation. Ohio provides a detailed, structured scheme under which: (1) the death penalty for aggravated murder is prohibited unless at least one of eight aggravating circumstances is specified in the indictment and proven beyond a reasonable doubt; after which (2) the defendant has great latitude in second phase to go forward with mitigation evidence; and (3) the prosecutor proves beyond a reasonable doubt in second phase that the aggravating circumstances outweigh mitigating factors; after which (4) the trial court undertakes its own, independent review of the aggravating circumstances and mitigating factors. In sum, the Court is not persuaded that Ohio's death penalty statute is unconstitutionally vague or permits arbitrary and capricious infliction of the death penalty through an inadequate "appropriateness" determination.

1.9 Defendant Bears Burden of Proving Mitigation By Preponderance

In the ninth sub-part of his first claim for relief, petitioner argues that Ohio's death penalty scheme is unconstitutional because the, defendant is required to prove the existence of mitigating circumstances by a preponderance of the evidence. Petitioner reasons that this requirement prevents the sentencer from considering relevant mitigating evidence which, while perhaps not satisfying the relevant evidentiary standard, may nonetheless provide a basis for a sentence less than death. *Petition* at ¶19.

As the Court noted *supra*, the Constitution does not prohibit states from requiring capital defendants to prove mitigation evidence by preponderance of the evidence, so long as the State's burden of proving aggravating circumstances beyond reasonable doubt is not lessened. *Walton v. Arizona*, 497 U.S. 639, 649-651 (1990)(plurality); *see also Lockett v. Ohio*, 438 U.S. 586, 609 and n.16 (1978)(plurality)(leaving intact the requirement that the defendant prove the existence of mitigating factors by a preponderance of evidence). Further, although the Ohio Supreme Court has equated the defendant's "burden of going forward" with mitigating evidence with proving that mitigating evidence by a preponderance of the evidence, *see State v. Jenkins*, 15 Ohio St. 3d 164, 171-72 (1984); *see also State v. Stumpf*, 32 Ohio St. 3d 95, 101-102 (1987), that same statutory provision gives the defendant "great latitude" in doing so. *See* R.C. §2929.03(D)(1). In sum, it is not *per se* unconstitutional to place on the defendant the burden of proving existence of mitigating factors, and in Ohio, the State still bears the burden of proving beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.

1.11 State Does Not Maintain Proper Data For Proportionality Review

In the eleventh sub-part of his first claim for relief, petitioner assails the constitutionality of Ohio's death penalty scheme on grounds that the scheme does not provide for sufficient excessiveness and disproportionality review. He asserts that Revised Code Sections 2929.021 and 2929.03, which require certain data to be reported by trial courts to appellate courts and the Ohio Supreme Court in all capital cases, critically do not require written life sentence recommendation reports. Petitioner also asserts that substantial doubts exist as to the accuracy of information reported by trial courts in capital cases after either guilty pleas to lesser offenses or after charge reductions at trial. In fact, petitioner argues, only minimal evidence is required in capital cases that result in sentences less than death. Petitioner asserts that these shortcomings prohibit adequate appellate review, which is an essential component to the constitutionality of a capital punishment scheme. *Petition* at ¶21.

Although the Supreme Court has held that States are not constitutionally required to provide appellate review of noncapital criminal cases, *Ross v. Moffitt,* 417 U.S. 600, 611 (1974), cases involving the death penalty are fundamentally different. *See Zant v. Stephens,* 462 U.S. 862, 884 (1983). Appellate review plays a crucial role in ensuring that the death penalty is not imposed arbitrarily or capriciously. For example, in *Gregg v. Georgia,* 428 U.S. 153, 211 (1976), the Court upheld Georgia's capital punishment scheme in large part because the statute required appellate review of every death sentence. *See also Proffitt v. Florida,* 428 U.S. at 253; *Jurek v. Texas,* 428 U.S. at 276. "[T]he Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by

statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases." *Gregg, supra,* 428 U.S. at 198. In *Pulley v. Harris,* 465 U.S. 37, 53 (1984), the Supreme Court reaffirmed the importance of appellate review to a capital punishment statutory scheme. There, the Court rejected the notion that proportionality review was required by the Eighth Amendment, *see also McQueen v. Scroggy,* 99 F.3d 1302, 1333-34 (6th Cir. 1996), but cautioned that *Gregg* "suggested that some form of meaningful appellate review is required." *Pulley,* 465 U.S. at 45.

Ohio's scheme of proportionality review by appellate courts is not unconstitutional. The Constitution does not require appellate courts to undertake this sort of comparison where the statutory scheme adequately channels the sentencer's discretion. *Pulley v. Harris,* 465 U.S. 37, 43-44 (1984). In *Pulley,* the Supreme Court explored the concept of "proportionality" review, noting that traditional proportionality review refers to an abstract evaluation of the appropriateness of a particular sentence for a particular crime, while another mode of proportionality review embodied in several state statutes presumes that the death sentence is not disproportionate to the crime, but purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because it is disproportionate to the punishments imposed in similar cases. *Id.* at 42-43. Faced with the question of whether the Eighth Amendment required a state appellate court, before affirming a death sentence, to compare the sentence to that imposed in similar cases if requested by the defendant to do so, the Supreme Court answered that question in the negative. *Id.* at 43-44. In so holding, the Court noted that, while its previous decision in *Gregg v. Georgia,* 428 U.S. 153 (1976), regarded

favorably proportionality review by appellate courts as an additional safeguard against arbitrary and capricious sentencing, *Gregg*, 428 U.S. at 198, 204-206, 222-223, its decision in *Gregg* by no means required such review. *Pulley*, 465 U.S. at 44-46. In Ohio, appellate courts are required statutorily to compare a death sentence to other cases where they have affirmed death sentences. While perhaps not the most comprehensive system of comparison, this framework is neither irrational nor unconstitutional.

Further, the Court is satisfied that the appellate review mandated by Ohio's death penalty statute essentially mirrors the sort of appellate review approved by the Supreme Court in *Gregg*. Ohio's statute requires both the court of appeals and supreme court in cases involving offenses committed prior to January 1, 1995, and the supreme court in all other cases, not only to review whether the evidence supports the aggravating circumstances found by the sentencing court and whether the sentencing court properly weighed those aggravating circumstances and mitigating factors, but also to conduct their own independent review the evidence, as well as the offense and the offender, to determine whether the aggravating circumstances outweigh the mitigating factors in the case. R.C. §2929.05(A). The appellate courts are additionally required to determine whether the death sentence is appropriate by considering whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. *Id.* Thus, petitioner has not demonstrated, and the Court is not otherwise persuaded, that the nature of appellate review accorded capital cases somehow renders Ohio's capital punishment scheme unconstitutional.

1.13 <u>No Means For Sentencer To Determine If Death Is "Appropriate" Sentence</u>

Petitioner argues in the thirteenth sub-part that Ohio's

death penalty statute is unconstitutional, in part, because, although the appellate courts are required to determine whether a given death sentence is "appropriate," there is no such requirement imposed upon the sentencer. Petitioner reasons that the sentencing body which recommends a death sentence -- either a jury or three-judge panel -- should be required to make a finding that the sentence of death is "appropriate," and to make that finding in such a fashion as to allow objective review by the appellate court and Ohio Supreme Court above. Otherwise, according to petitioner, arbitrary decisions are likely at the appellate level if courts are forced to make assumptions as to what the sentencer considered. *Petition* at ¶23.

Decisions issued by the United States Supreme Court appear to regard the "appropriateness" of a death sentence as the individualized sentencing determination that is undertaken after a jury or trial court has concluded that a defendant is eligible for the death penalty. *See Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990); *California v. Ramos*, 463 U.S. 992, 1007 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Under Ohio's capital punishment scheme, a defendant is death-eligible once the defendant has been charged with and found guilty of aggravated murder and at least one death penalty specification. Thereafter, "appropriateness" of the death penalty is determined when the sentencing body undertakes a separate review of whether the aggravating circumstances outweigh any mitigating factors. The courts of appeals and Ohio Supreme Court are obligated, not only to review the trial court's assessment, but also to independently determine whether the sentence is proportionate, non-excessive, and appropriate based on the record of aggravating circumstances and mitigating factors. The Court is satisfied that Ohio's scheme identifies those death-eligible defendants who are actually deserving of the death sentence within the confines of the Eight Amendment, as set forth in *Gregg v. Georgia*,

supra.

Petitioner's argument about the "appropriateness" of a death sentence exults form over substance. "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida,* 468 U.S. 447, 460 (1984). This Court has already concluded that Ohio's death penalty statute more than adequately balances the twin objectives set forth in *Gregg,* ensuring that the sentencer's discretion is suitably directed and limited, and that the sentencer undertake an individualized review of the defendant and the nature and circumstances of the case. That Ohio's statute, in directing the sentencer how rationally to select those death-eligible defendants whom should actually be sentenced to death, fails expressly to employ the word *appropriate,* does not, in this Court's view, mean that the sentencer is not doing just that, nor does it render the statutory framework unconstitutional. Thus, the argument raised in the thirteenth sub-part of petitioner's first claim for relief is not well taken.

1.15 Proportionality Review Is Flawed Because of Method of Case Comparison

In the fifteenth sub-part of his first claim for relief, petitioner argues that Ohio's capital punishment scheme is unconstitutional because of flawed proportionality review. Specifically, petitioner asserts that Ohio's statute does not require a sentencing jury or three-judge panel that recommends a sentence less than death to identify the mitigating circumstances, thereby preventing significant comparison of cases. Contributing to the flawed proportionality review, petitioner adds, are the accelerated review employed by the appellate courts and the requirement that only minimal information be included in sentencing

findings. Finally, petitioner complains that no meaningful comparison of cases can be accomplished when appellate courts are required to consider only those cases already decided by that court in which death was imposed. *Petition* at ¶¶26-28. Petitioner's assertions do not warrant habeas corpus relief.

With respect to petitioner's arguments concerning the quality of proportionality review in Ohio's appellate courts, petitioner's argument must be rejected, for, as the Court has already noted, proportionality review is not required by the Constitution. *Pulley v. Harris,* 465 U.S. 37, 43-44 (1984). The Supreme Court noted in *Pulley* that, while its previous decision in *Gregg v. Georgia,* 428 U. S. 153 (1976), regarded favorably proportionality review by appellate courts as an additional safeguard against arbitrary and capricious sentencing, *Gregg,* 428 U.S. at 198, 204-206, 222-223, its decision in *Gregg* by no means required such review. *Pulley,* 465 U.S. at 44-46. That being so, petitioner's complaints about Ohio's scheme of proportionality review are essentially foreclosed.

As for petitioner's remaining arguments, the Court has already noted the importance of appellate review to the functioning of Ohio's capital punishment scheme, and its satisfaction that the appellate review mandated by Ohio's death penalty statute essentially mirrors the sort of appellate review approved by the Supreme Court in *Gregg.* Ohio's statute requires both the court of appeals and supreme court in cases involving offenses committed prior to January 1, 1995, and the supreme court in all other cases, not only to review whether the evidence supports the aggravating circumstances found by the sentencing court and further whether the sentencing court properly weighed those aggravating circumstances and mitigating factors, but also to conduct their own independent review the evidence, as well as the offense and the offender, to determine whether the

aggravating circumstances outweigh the mitigating factors in the case. R.C. §2929.05(A). The appellate courts are additionally required to determine whether the death sentence in appropriate by considering whether the sentence is excessive or disproportionate to the penalty imposed in similar case. *Id.* Thus, petitioner's complaint that Ohio's appellate review is constitutionally infirm because it employs accelerated review, requires only minimal information to be included in the written findings at sentencing, uses what petitioner terms "an as yet undetermined method of comparison," and gathers incomplete and inadequate data, is not well taken.

It bears reminding that federal habeas courts reviewing the constitutionality of a state's capital punishment scheme are entrusted, not to opine or legislate what would be the most ideal capital punishment scheme, but only to ensure that the state's scheme and application thereof comports with constitutional safeguards, *i.e.*, that death sentences are not imposed arbitrarily or capriciously. Petitioner has not demonstrated, and the Court is not otherwise persuaded, that the review conducted by Ohio's appellate courts somehow renders Ohio's capital punishment scheme constitutionally infirm.

1.16 Appellate Courts' Reweighing Is Too Cursory

In the sixteenth sub-part of his first claim for relief, petitioner assails the quality of the statutorily-required "appropriateness" review undertaken by Ohio's appellate courts. Specifically, petitioner asserts that the Ohio Supreme Court and courts of appeals have failed to follow the dictates of R.C. §2929.05(A), requiring them to undertake a determination of the appropriateness of a death sentence by examining for themselves whether the aggravating circumstances outweigh the mitigating factors. According to petitioner, the appropriateness review ultimately conducted

in each case has become cursory and meaningless, and fails to genuinely distinguish between those individuals for whom death is an appropriate sentence and those for whom death is not an appropriate sentence. *Petition* at ¶¶29-30.

The Ohio appellate courts are required under R.C. §2929.05(A) to determine whether the sentence of death is appropriate. That section provides in relevant part:

> In determining whether the sentence of death is appropriate, the court of appeals ... and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. *** The court of appeals ... or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

R.C. §2929.05(A). The appellate courts and Ohio Supreme Court, admittedly, have blurred somewhat the lines defining "appropriateness." Although R.C. §2929.05(A) clearly speaks of "appropriateness" as a proportionality review and one distinct from the inquiry into whether the aggravating circumstances outweigh the mitigating factors, most decisions issued by the appellate courts and Ohio Supreme Court speak of "appropriateness" far less clearly, often treating it as an inquiry separate from the proportionality review and as a summary conclusion following their independent inquiry into whether the sentence of death is excessive, disproportionate, or incorrect based on the record of aggravating circumstances and mitigating factors. *See State v. Sowell,* 39 Ohio St. 3d 322, 337 (1988)("we find that

the sentence of death in this action is not excessive or inappropriate, and we further find that this sentence is not disproportionate to those imposed in similar cases."); *State v. Post,* 32 Ohio St. 3d 380, 395 (1987)("the death sentence imposed in the case sub judice is appropriate and is neither excessive nor disproportionate."); *see also State v. Hutton,* 72 Ohio App. 3d 348, 351 (Ohio App. 8 Dist. 1991). This murkiness gives some credence to petitioner's argument.

That said, petitioner has not demonstrated, and the Court is not otherwise persuaded, that the "appropriateness" review employed by the appellate courts in Ohio ultimately is constitutionally infirm. Decisions issued by the United States Supreme Court appear to regard the "appropriateness" of a death sentence as the individualized sentencing determination that is undertaken after a jury or trial court has concluded that a defendant is eligible for the death penalty. *See Blystone v. Pennsylvania,* 494 U.S. 299, 305 (1990); *California v. Ramos,* 463 U.S. 992, 1007 (1983); *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976). Under Ohio's capital punishment scheme, appropriateness of the death penalty is determined when the sentencing body, having already found that a defendant convicted of aggravated murder is death-eligible because one or more aggravating circumstances has been proven beyond a reasonable doubt, undertakes a separate review of whether the aggravating circumstances outweigh any mitigating factors. The courts of appeals and Ohio Supreme Court are obligated, not only to review the trial court's assessment, but also to independently determine whether the sentence is proportionate, non-excessive, and appropriate based on the record of aggravating circumstances and mitigating factors. The Court is satisfied that Ohio's scheme identifies those death-eligible defendants who are actually deserving of the death sentence within the confines of the Eight Amendment, as set forth in *Gregg v. Georgia, supra.*

1.17 Death Penalty is Cruel and Unusual *Per Se*

1.18 Death Is Neither Least Restrictive Nor Most Effective Punishment

In the seventeenth sub-part of his first claim, petitioner argues that capital punishment amounts to cruel and unusual punishment *per se.* In the eighteenth sub-part, he argues that the State failed to establish in his case that death is least restrictive and most effective means to serve society's interests in deterrence, incapacitation, retribution. *Petition* at ¶¶32-37. The Court will address these arguments together.

In *Gregg v. Georgia,* 428 U.S. 153 (1976), the Supreme Court held that the punishment of death does not invariably violate the Constitution, in that it is neither excessive nor disproportionate. With respect to the excessiveness inquiry, the Court noted that "imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England," *id.* at 176-77, and that, "the existence of capital punishment was accepted by the Framers," *id.* -- and accordingly rejected the Eighth Amendment argument that the standards of decency had evolved to the point where capital punishment is no longer acceptable. "Despite the continuing debate, dating back to the 19th Century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction." *Id* at 179. With respect to whether the punishment of death is disproportionate in relation to the crime of murder, the Court stated, "when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime." *Id.* at 187. Thus, faced squarely with the question whether capital punishment violated the Eighth Amendment's prohibition against cruel and unusual

punishment, the Supreme Court concluded definitively that:

> Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Id. at 186-87. Specifically, the Supreme Court concluded that imposition of the death penalty for murder was neither excessive nor disproportionate, as those terms had come to be defined throughout the course of the Court's Eighth Amendment jurisprudence. *Id.* at 171-187.

In so holding, the Supreme Court considered the very arguments that petitioner now offers -- namely, that the death penalty violates the Eighth Amendment inasmuch as it is neither the least restrictive nor most effective means of furthering the societal interests of deterrence, incapacitation/ isolation, or retribution/moral reinforcement.[3] With respect to retribution, the Court insightfully noted:

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[3] This Court is mindful of the fact that, in the years since *Gregg*, the argument that any of these interests -- deterrence, retribution, or incapacitation -- are effectively or narrowly furthered by capital punishment has been fodder for many dissenting opinions. *See Harris v. Alabama,* 513 U.S. 504, 517-520 (1995)(Stevens, J., dissenting); *Spaziano v. Florida,* 468 U.S. 447, 477-480 (1984)(Stevens, J., concurring in part and dissenting in part); *California v. Ramos,* 463 U.S. 992, 1023-1024 (1983)(Marshall, J., dissenting).

> In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

Id. at 183. Observing that countless studies into the deterrent effect of capital punishment had produced a great deal of debate and inconclusive results, the Court resolved:

> We may nevertheless assume safely that there are some murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. *** The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

Id. at 185-86. Finally, with respect to incapacitation of dangerous offenders, the Court simply acknowledged, without exploring, the fact that this is another oft-cited societal interest in support of capital punishment. *Id.* at 183 n.28.

After concluding that capital punishment did not invariably violate the Constitution, the Court proceeded to delineate the boundaries within which capital punishment schemes would have to operate to comport with the Eighth Amendment's prohibition against cruel and unusual

punishment. Specifically, the Court concluded that, to minimize the risk that death sentences would be imposed in an arbitrary and capricious manner, the sentencing body's discretion with respect to the grave determination of whether a human life should be taken or spared must be suitably directed and limited to minimize the risk of wholly arbitrary and capricious action. *Gregg*, 428 U.S. at 188-89.

> [I]n summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Id. at 195. The statutory provisions governing the Ohio capital punishment scheme bear a striking resemblance, both as enacted and enforced at the time petitioner was indicted and convicted, to the scheme suggested by the Supreme Court in *Gregg*.

In sum, petitioner's claim that the statutory provisions governing Ohio's capital punishment scheme, and that capital punishment in general, violate the Eighth Amendment's prohibition against cruel and unusual punishment is belied by Supreme Court precedent. Ohio's scheme does not violate the Eighth Amendment insomuch as the Supreme Court has held that states can authorize capital punishment against an individual who intended to and did kill another or whose reckless indifference to human life resulted in the death of another. Ohio's scheme authorizes capital punishment only

when a defendant has been found guilty of aggravated murder, (defined as purposely causing the death of another), and at least one statutorily-designated aggravating specification. Petitioner's argument to the contrary is not well taken.

Second Claim for Relief

In his second claim for relief, petitioner argues that his guilty plea was not knowing, voluntary, and intelligent. As more fully described in the Court's November 9, 1999 Opinion and Order, petitioner and another individual, Clyde Daniel Wesley, participated in an armed robbery during which the victim in this case, Mary Jane Stout, was shot and killed. Petitioner has consistently maintained that Wesley fired the shots that killed Mrs. Stout. He has also admitted, however, to his participation in the robbery, and to shooting Mrs. Stout's husband, who survived the attack. Petitioner asserts that he derived no benefit from pleading guilty to the capital murder charge, that he never specifically affirmed his guilt during the plea colloquy, that he did not understand when he entered his guilty plea that he could still be sentenced to death, and that his counsel was ineffective for failing to advise him at that stage that he was not benefitting from the plea bargain and that he could still be sentenced to death. *Petition* at ¶¶38-47.

When a criminal defendant pleads guilty, he waives numerous fundamental constitutional rights -- including the right against compulsory self-incrimination, the right to trial by jury, and the right to confront his accusers. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Id.* at 242. In light of the numerous fundamental constitutional guarantees that a defendant forfeits when he pleads guilty, the state has the burden to demonstrate that the plea is voluntary,

intelligent, and knowing. *Id*; *see also Garcia v. Johnson*, 991 F.2d 324, 326 (6th Cir. 1993). Generally, a plea is voluntary if it is not induced by threats or misrepresentations and if the defendant is advised of the direct consequences of the plea. *Brady v. United States*, 397 U.S. 742, 755 (1970). A plea is intelligent if the defendant understands the rights that he waives. *Boykin v. Alabama*, *supra*, 395 U.S. at 243.

A determination of the voluntariness and intelligence of a guilty plea must be made upon an analysis of the totality of the circumstances. *Garcia*, 991 F.2d at 327; *see also Berry v. Mintzes*, 726 F.2d 1142 (6th Cir.), *cert. denied*, 467 U.S. 1245 (1984). When a defendant later challenges the plea in federal habeas corpus on the ground that it was not voluntary, intelligent, and knowing, the state generally satisfies its burden by producing a transcript of the state court proceedings. *Garcia*, 991 F.2d at 326; *Dunn v. Simmons*, 877 F.2d 1275, 1277 (6th Cir. 1989), *overruled on other grounds by Parke v. Raley*, 506 U.S. 20 (1992). A state court's factual finding that the plea was proper generally enjoys a presumption of correctness in federal habeas corpus. *Garcia*, 991 F.2d at 326; *Dunn*, 877 F.2d at 1277. But when the transcript is inadequate to show that a plea was voluntary and intelligent, the presumption of correctness is called into question. *Garcia*, 991 F.2d at 326; *see also Jones v. Parke*, 734 F.2d 1142, 1148 (6th Cir. 1984).

> Where the [guilty plea] is subsequently challenged, the state normally will attempt to demonstrate its effectiveness by introducing a transcript of the proceedings surrounding the trial court's acceptance of the guilty plea, and other trial court records. Where the records leave doubt as to whether the plea was in fact intelligent and voluntary, the state may look to evidence extrinsic to the court records, such as the recollection of those attending the plea

> proceedings. However, in the face of a record which is inadequate to demonstrate the regularity of proceedings at the time of a guilty plea's acceptance, the state must make a clear and convincing showing with extrinsic evidence that the plea was in fact intelligently and voluntarily entered.

Dunn v. Simmons, *supra*, 877 F.2d at 1277 (*citing Roddy v. Black*, 516 F.2d 1380, 1384 (6th Cr.), *cert. denied*, 423 U.S. 917 (1975)).

The record of state court proceedings surrounding the accepting of petitioner's guilty plea, although not a picture of clarity, is relatively straightforward. The furthest that the proceedings strayed from "regularity" actually came prior to petitioner's entering his guilty pleas. Jury selection began on August 20, 1984, after the trial court heard arguments on and eventually overruled defense counsel's motion to suppress statements. Jury selection abruptly ended on August 23, 1984, however, when petitioner apparently waived a jury trial. The proceedings resumed on September 17, 1984 before a three-judge panel, with Presiding Judge Henderson reading into the record the written jury waiver that petitioner had signed and filed on August 23, 1984.[4] (Tr., 09/17/84, at 4-5).

Immediately after reading that statement into the record, the trial court was advised by the prosecuting attorney that a plea agreement had been reached. The terms of that agreement, as they were set forth by the prosecuting attorney, are recounted here verbatim:

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[4] It does not appear that any colloquy ensued between the trial court and petitioner regarding his waiver of a jury trial.

MR SCOTT: Your Honor, the first matter that would be dealt with or the State would ask leave of Court pursuant to Criminal Rule 7(D) and Ohio Revised Code Section 2941.30 to amend by interlineation specification one to the first count of the Indictment in order that it may read as follows: The Grand Jurors further find and specify under Ohio Revised Code Section 2929.04(A)(3) in compliance with Ohio Revised Code Section 2941.14 that the aforesaid offense being the offense charged in the first count, the Aggravated Murder, was committed for the purpose of escaping detection, apprehension, trial or punishment for other offenses -- the words, "other offenses" are the first change, committed by the above named John David Stumpf, to wit: Aggravated Robbery and then we're adding the language "and Attempted Aggravated Murder". If that amendment is granted, the defendant then would enter a plea of guilty to the first count contained in the Indictment, being the Aggravated Murder count and a plea guilty to specification one to the first count as amended; would also enter a plea of guilty to the second count in the Indictment, being the offense of -- excuse me, back up. As to the first count he would also enter a plea of guilty to specification four to the first count. So, he will be pleading to the first count, the amended specification one to the first count and specification four to the first count. With regard to the second count, being the Attempted Aggravated Murder, he would enter a plea of guilty to the Attempted Aggravated Murder and a plea of guilty to the

specification to the second count. If the pleas of guilty to the two counts and the specifications I've mentioned are accepted by the Court, the Court would then proceed under Criminal Rule 11(C)(3) to determine if there is a factual basis for the plea of guilty to the Aggravated Murder charge and the existence of the aggravating circumstances and if the pleas are accepted the State would then ask leave to enter a nolle pros as to specifications two and three to the first count and also a nolle pros as to the third, fourth and fifth counts in the Indictment and including the specification to the third count.

(Transcript, 09/17/84, at 6-7). When asked by the trial court whether he "affirmatively acknowledged" the agreement as stated by the prosecuting attorney, petitioner answered, "Yes, sir." (Tr., 09/17/84, at 8). The trial court granted leave to amend the indictment as indicated above, and petitioner apparently initialed those changes. (*Id.* at 10).

The trial court then engaged petitioner and his attorneys in a colloquy to determine that his guilty pleas were voluntary, intelligent, and knowing. When asked whether they had fully investigated the facts and law, determined whether there existed any question as to the admissibility of statements and other evidence, and informed the petitioner of the elements of the offenses, as well as defenses and constitutional rights available to him, petitioner's counsel answered, "Yes, we have." (*Id.* at 11). Petitioner, after being sworn, then answered a series of questions posed by the trial court regarding the nature of the charges against him and the federal constitutional guarantees that he was forfeiting. Most important, for purposes of this discussion, was the following exchange:

JUDGE HENDERSON: For the first count, which is that of Aggravated Murder, you are subject to being -- to a sentence of twenty years without probation, that is, a sentence of life without probation for twenty years; a sentence of life without probation for a period of thirty years and the death penalty by electrocution could be imposed against you. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

(*Id.* at 14). Later, the trial court asked:

JUDGE HENDERSON: Do you understand, Mr. Stumpf, that if any promises or inducements have been made to you by any person to cause you to plead guilty that they are not binding upon the Court, that if you plead guilty the Court, this panel of Judges, will decide your sentence after considering all of the evidence that is to be presented and evidence in mitigation of punishment and after considering a presentence investigation, report and recommendation approved and prepared by the probation department and that you may receive the maximum sentence prescribed by law. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Have any promises or inducements been made to you, sir, other than the agreement which you have affirmatively acknowledged on the record.

THE DEFENDANT: No, sir.

(*Id.* at 17-18). When the trial court then asked petitioner whether he was in fact guilty of the Aggravated Murder charge, defense counsel interrupted, at petitioner's behest, and explained that, although petitioner's answer would be "yes," it was petitioner's understanding that he would be given the opportunity to present evidence relevant to his conduct. (*Id.* at 18). Following that clarification, the trial court again asked petitioner whether he was "in fact guilty of the charge set forth in Count One, including specification one and specification four," to which petitioner responded, "Yes, sir." (*Id.* at 18-19).

After the plea colloquy, the trial court conducted an evidentiary hearing, as required under Ohio law with respect to guilty pleas in capital cases, to determine that there was a factual basis for petitioner's plea. The hearing, which began on September 18, 1984, concluded on September 20, 1984 with petitioner being found guilty of each offense to which he had pleaded guilty. Following the mitigation proceedings, the trial court reconvened on September 24, 1984 and sentenced petitioner to death on Count One.

Aside from the abrupt manner in which the trial proceedings shifted from jury selection to a three-judge panel facing a negotiated plea, the transcript of the proceedings surrounding petitioner's guilty plea suggests both an air of regularity and that petitioner's plea was voluntary, intelligent, and knowing. After the prosecuting attorney explained the plea agreement that had been reached, petitioner affirmatively acknowledged the agreement. (Tr., 09-17-84, at 6-8). Petitioner's attorneys affirmed on the record that they had investigated the facts and law relevant to the case, and had examined the admissibility of various statements and evidence. (*Id.* at 10-11). They further affirmed that they had informed petitioner of the elements of

the offenses with which he was charged, of all the defenses that were available to him, and of all his constitutional rights. (*Id.* at 11). Petitioner personally acknowledged that his attorneys had informed and advised him as such. (*Id.* at 13). Petitioner also affirmed that he understood that, for the offense of aggravated murder, he was eligible for, among other penalties, death by electrocution. (*Id.* at 14). Later, he acknowledged an understanding that, regardless of what promises or inducements may have been made to him, punishment would ultimately be determined by the trial court and that the Court could impose the maximum sentence. (*Id.* at 17-18). Finally, petitioner answered that he was in fact guilty of the offense of aggravated murder -- albeit, only after a statement by defense counsel emphasizing that petitioner had requested counsel to explain to the trial court that petitioner would answer that he was guilty, with the understanding that he would have the opportunity to present evidence relevant to his conduct. (*Id.* at 18-19). Petitioner averred that he was not under the influence of drugs or alcohol, and the transcript does not suggest otherwise. (*Id.* at 13-14). All of the foregoing indicates a plea that was voluntary, intelligent, and knowing.

With respect to petitioner's argument that he derived no benefit from pleading guilty to the aggravated murder offense, that might appear, in hindsight, to be true. But criminal defendants who make solemn admissions and declarations under oath will not be permitted to challenge the voluntariness of an otherwise valid plea -- made with a professed understanding of the nature of the charges, the rights waived, and the direct consequences including the maximum possible sentence -- simply because they ultimately did not obtain the results they had desired.

> A guilty plea invariably is made without complete foresight of the possible outcome of alternative procedures that might have been undertaken. Thus, an accused, with the assistance of his attorney, must examine the evidence which the Government has amassed against him, consider possible defenses, weigh the costs and benefits of proceeding to trial and ultimately decide, in light of the information then available, whether to enter a guilty plea. There is no guarantee that the accused will make the correct decision or that in hindsight such plea will not reflect an error in fact or judgment. Such uncertainty, which after all is the linchpin of every plea bargain, is inherent in a guilty plea and does not make the plea involuntary.

United States v. Turner, 881 F.2d 684, 686-87 (9th Cir.), *cert. denied*, 110 S.Ct. 199 (1989) (quoting *Johnson v. United States*, 539 F.2d 1241, 1243 (9th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977)). *See also McMann v. Richardson*, 397 U.S. 759, 769-771 (1970)("a guilty plea is not rendered involuntary merely because in hindsight the defendant wishes he had chosen a different course of action."); *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092, 1098 (2d Cir. 1972)("a defendant's mistaken subjective impressions gained from conferences with his legal counsel, in the absence of substantial objective proof showing that they were not reasonably justified, do not provide sufficient grounds upon which to set aside his guilty plea."), *cert. denied*, 410 U.S. 945 (1973).

As the Court noted above, petitioner affirmatively acknowledged his understanding of and agreement with the plea negotiations, as they were explained on the record by the prosecuting attorney. Ordinarily, "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). That said, the Court acknowledges that the prosecuting attorney's explanation of

the plea arrangements was somewhat difficult to follow, and that criminal defendants in such situations will often answer questions posed by the trial court without a clear understanding of each and every term uttered -- especially if advised by counsel to do just that. Prophylactic colloquies designed to foreclose subsequent attacks are "neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations." *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (*per curiam*); *see also Machibroda v. United States*, 368 U.S. 487, 494-96 (1962); *Blackledge*, *supra*, 431 U.S. at 74-75; *United States v. Todaro*, 982 F.2d 1025, 1030 (6th Cir.), *cert. denied*, 508 U.S. 943 (1993). However, the Court is faced with a transcript revealing a comprehensive colloquy between the trial court and petitioner, during which petitioner professed an understanding of the nature of the charges against him, the rights that he was waiving, and the direct consequences of his plea -- including the maximum possible sentence, that being death. In light of the foregoing, petitioner's argument that he derived no benefit from the plea bargain does not persuade the Court that his plea was not voluntary and intelligent.

Another argument advanced by petitioner in support of his challenge to the validity of his guilty plea is that he never actually affirmed that he was guilty of the aggravated murder offense. Petitioner's assertion is belied by the record. As the Court discussed above, petitioner answered, when asked by the trial court whether he was in fact guilty of the offense of aggravated murder, that he was -- albeit, only after a statement by defense counsel emphasizing that petitioner had requested counsel to explain to the trial court that petitioner would answer that he was guilty, with the understanding that he would have the opportunity to present evidence relevant to his conduct. (Transcript, 09/17/84, at 18-19). That petitioner's attorney qualified petitioner's position with respect to the question of whether he was in fact guilty of aggravated murder does not diminish or otherwise

undermine the answer that petitioner ultimately gave under oath -- namely, yes, that he was in fact guilty of aggravate murder. "[A] temporary qualification of position by the defendant is not sufficient to rebut the presumption of correctness of state court proceedings, and to support a finding that [the defendant] did not understand the nature of his plea." *Garcia v. Johnson*, *supra*, 991 F.2d at 327. Petitioner will not now be heard to assert that he never actually affirmed that he was guilty of aggravated murder.

Petitioner also argues, in support of his challenge to the validity of his guilty plea, that he did not understand that he would still be eligible for the death sentence. Again, petitioner's assertion is belied by the record. As the Court discussed above, when the trial court asked petitioner whether he understood that, by pleading guilty to the aggravated murder offense and specifications, he would be eligible for a life sentence with possibility of parole in twenty years, a life sentence with possibility of parole in thirty years, or death by electrocution -- petitioner answered, "yes, sir." (Transcript, 09/17/84, at 14). Later, petitioner acknowledged that he understood that, regardless of inducements or representations that may have been made to him, the trial court alone would decide his punishment and the trial court could impose the maximum sentence. (*Id.* at 17-18). Petitioner gave his answers on the record and under oath. His after-the-fact assertion that the answers he gave then were false, while the assertions he makes now are true, is an insufficient basis for determining that his plea was not knowing or voluntary.

Further, petitioner was represented by counsel, and, no doubt, discussed possible sentences with his attorney. "[I]t taxes credibility to suggest that the paramount question of sentence, from the point of view of the accused, would have remained unexplored in the attorney/client conferences." *Berry v. Mintzes*, 726 F.2d 1142, 1149 (6th Cir.), *cert.*

denied, 467 U.S. 1245 (1984). Defense counsel were well aware that petitioner was eligible for the death sentence. During the evidentiary hearing to determine that a factual basis existed for petitioner's guilty pleas, one of petitioner's attorneys noted in his opening statement that it was necessary to determine whether there was also a factual basis for the first specification to the aggravated murder count, "being the specification which does authorize the death penalty in this case." (Transcript, 09/17/84, at 35). It seems highly unlikely, in the absence of evidence to the contrary, that defense counsel did not apprise petitioner that he was eligible for the death penalty. Thus, above and beyond what is evident from the transcript of the plea colloquy -- namely, that petitioner stated under oath not once, but twice, that he understood that he was eligible for the death sentence -- the fact that petitioner was represented by counsel bolsters this Court's conclusion that possible sentences, including death, were discussed when considering whether petitioner should enter a guilty plea to the aggravated murder sentence.

Petitioner further argues that his plea was not voluntary and intelligent, due to the ineffectiveness of his attorneys in not informing him that he would derive no benefit and that he would still be eligible for the death penalty. As discussed above, the Court must proceed with caution in the face of after-the-fact assertions that what petitioner said under oath during the plea colloquy was false, while what he asserts now is true. During the plea colloquy, petitioner's attorneys affirmatively acknowledged that they had advised petitioner of the nature of the charges that he faced, of his possible defenses, and of the rights that he was waiving. Petitioner, who was present during that exchange between the trial court and defense counsel, confirmed that his attorneys had advised and informed him as such. The Court has before it a transcript that indicates a knowing, intelligent, and voluntary plea. The only evidence that petitioner has introduced to challenge the validity of his

pleas, as well as the apparent regularity of the state court proceedings, is his own affidavit, first submitted to the trial court as an exhibit to his postconviction action. Although the Court is neither free, nor inclined, to disregard that affidavit altogether, that affidavit, without more, does not permit the Court to dismiss the validity of answers and a plea of guilty given by petitioner on the record and under oath. *See Cuppett v. Duckworth*, 8 F.3d 1132, 1139 (7th Cir. 1993), *cert. denied*, 510 U.S. 1180 (1994); *Dempsey v. Wainwright*, 471 F.2d 604, 607 (5th Cir.), *cert. denied*, 411 U.S. 968 (1973); *see also Faught v. Cowan*, 507 F.2d 273, 275 (6th Cir. 1974), *cert. denied*, 421 U.S. 919 (1975).

It is evident from the record that defense counsel's strategy was to demonstrate during the evidentiary hearing, as well as the mitigation hearing, that petitioner did not fire the shots that killed the victim, and that the death penalty, accordingly, was either not authorized or not appropriate. This is amply demonstrated by the record, and petitioner has not sufficiently rebutted either the regularity of the plea proceedings, or that counsel's choices were borne from neglect and a dereliction of duty, as opposed to reasoned trial strategy.

For all of these reasons, the Court concludes that petitioner's second claim for relief is without merit.

Fourth Claim for Relief

In his fourth claim for relief, petitioner argues that his attorneys were constitutionally ineffective during the penalty phase of the case. There are seven sub-parts to this claim:

> 4.1 That counsel agreed to a mental examination which was not conducted in accordance with the provisions of Ohio law;

4.2 That counsel did not retain an independent psychological expert to assist during the penalty phase;

4.3 That counsel did not spend enough time preparing for the mitigation hearing;

4.4 That counsel did not select the most appropriate witnesses to testify and did not properly prepare other witnesses for their testimony;

4.5 That counsel failed to authenticate mitigation questionnaires which were distributed in Stumpf's home community, thus precluding the court from giving substantial weight to them;

4.6 That counsel did not prepare Stumpf adequately to give his unsworn statement, allowing him to focus on denying his involvement in the shooting of Mary Jane Stout rather than on factors relating to mitigation; and

4.7 That counsel did not object to the Court's receipt of the presentence investigation report, the victim impact statements, or the prosecutor's comments upon the unsworn nature of Stumpf's statement.

The right to counsel guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. *McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970). The standard for reviewing a claim of ineffective assistance of counsel is twofold:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). With respect to the first prong of the *Strickland* test, the Court notes that, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

To establish the second prong of the *Strickland* test, *i.e.,* prejudice, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because Petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel, should the Court determine that Petitioner has failed to satisfy one prong, it need not consider the other. *Id.* at 697.

Inherent in counsel's responsibilities is the duty to investigate. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland, supra,* 466 U.S. at 691; *Sims v. Livesay,* 970 F.2d 1575, 1580-81 (6th Cir. 1992); *see also O'Hara v. Wigginton,* 24 F.3d 823, 828

(6th Cir. 1994)(failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that investigation was not warranted); *Workman v. Tate*, 957 F.2d 1339, 1345-46 (6th Cir. 1992) (reasonable investigation was lacking, so counsel's performance was deficient). The importance of competent representation during the penalty phase of a capital trial cannot be understated, especially with respect to the duty to investigate, since, as a practical matter, all that stands between a defendant who has been convicted of a capital specification and death is whatever mitigation evidence he can muster. *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir.), *cert. denied*, 528 U.S. 946 (1999).

> [C]ertainly, trial counsel must commit a serious error to be judged unconstitutionally ineffective. However, when a client faces the prospect of being put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation.

Id. The Court will now consider each of petitioner's allegations of ineffectiveness.

4.1 Improper Mental Examination

In this sub-part, petitioner argues that his trial counsel were constitutionally ineffective for consenting to a procedure for a mental examination of petitioner that was not authorized by statute. Petitioner complains that, under this improper procedure, the state was permitted to require him to submit to a mental examination by a specialist of the prosecutor's choosing. He further complains that he was unable to utilize the examining psychologist or psychiatrist of his choice to prepare a coherent mitigation theory, because the agreed-upon procedure required that reports of the mental examination were to remain sealed and unavailable to the

attorneys until a determination of guilt or innocence was made. *Petition*, at ¶56(a). Petitioner raised this issue in postconviction, and both the trial court and court of appeals summarily determined that petitioner had received effective assistance of counsel during the trial and sentencing phases.

Petitioner refers to an order issued by the trial court in August, 1984, before petitioner waived his right to a jury trial and pleaded guilty. The order summarizes an agreement reached by petitioner, his counsel, and the prosecuting attorney regarding the procedure for conducting a mental examination of petitioner in the event that petitioner was convicted and a mitigation hearing would occur. (Exhibit LL to Return of Writ, Amended Petition To Vacate, at exhibit 11). Noting that petitioner had informed the trial court of his intention to request a mental examination in the event that he was convicted of aggravated murder and at least one death penalty specification, the order specified that all mental examinations and presentence investigations would be conducted in accordance with R.C. §2929.03(D)(1). The order further authorized petitioner to enlist, at the state's expense, a qualified psychiatrist or psychologist to examine him, while also requiring petitioner to submit to a mental examination by a psychiatrist or psychologist of the prosecutor's choosing. Finally, the order also provided that all reports would remain sealed, and that none of the individuals conducting the mental examinations would reveal their findings to either party or the court, unless and until requested by petitioner ***after*** a finding of guilt by the jury as to the aggravated murder count and at least one death penalty specification.

It appears from the record that, although the prosecution exercised its option to have petitioner evaluated by a psychologist, defense counsel did not. It further appears from the mitigation transcript and exhibits that neither the prosecution nor defense counsel presented testimony or any

evidence concerning a psychological evaluation of petitioner.

As noted above, to demonstrate constitutional ineffectiveness, petitioner must first show that his attorneys were so deficient as to fall below the standards of professional norms. Petitioner has not shown this, inasmuch as the agreed-upon procedure for mental examination about which petitioner complains, to the extent that it deviated from the procedure provided for by statute, was not inherently prejudicial and did not prejudice the petitioner in this case. Section 2929.03(D)(1) of the Ohio Revised Code provides that a capital defendant may request the trial court to order that a presentence investigation report and/or a mental examination be made in preparation for the mitigation hearing, that no such examinations will be made except at the defendant's request, and that copies of any such reports will be furnished to the jury, trial court, prosecuting attorneys, and the defendant.

Although this procedure is often criticized, Ohio courts have held that it is not unconstitutional, and have consistently rejected the argument that attorneys are constitutionally ineffective for utilizing it. *State v. McNeil,* 83 Ohio St.3d 438, 450-51 (1998); *State v. Keith,* 79 Ohio St.3d 514, (1997); *State v. Esparza,* 39 Ohio St.3d 8, 9 (1988); *State v. Buell,* 22 Ohio St.3d 124, 138 (1986). That is especially so when any negative information contained in the reports does not harm the defendant, either because that information was not inherently prejudicial or because it was established through the evidence already presented at trial, and when the report reveals useful evidence in mitigation. In sum, the decision to request a presentence investigation report or mental examination under R.C. §2929.03(D)(1), so long as there was some reasoned basis for it, is generally a tactical decision not to be second-guessed in hindsight.

To the extent that the procedure to which defense

counsel acquiesced deviated from the procedure provided for under R.C. §2929.03(D)(1), petitioner has not demonstrated, and it does not otherwise appear to the Court, either that the agreed-upon procedure was inherently prejudicial or that petitioner suffered any actual prejudice. Accordingly, it cannot be said that trial counsel fell below reasonable professional norms in consenting to the procedure or that petitioner was prejudiced by their actions. The procedure memorialized in the trial court's August 1984 order deviated from R.C. §2929.03(D)(1) in requiring petitioner to submit to two different evaluations, one by a psychologist of defense counsel's choosing and one by a psychologist of the prosecution's choosing. Under the statute, a defendant would submit to a single mental examination by a psychologist or psychiatrist of the court's choosing. It does not appear though, that this deviation was inherently prejudicial or that petitioner was actually prejudiced, insofar as it enabled defense counsel to have petitioner examined, at the state's expense, by a psychologist of their own choosing, a choice that is not normally available under the statute.[5]

The agreed-upon procedure also deviated from §2929.03(D)(1) in the fact that the reports were to remain sealed until after a determination on guilt or innocence had been made. Although that provision is curious, in light of the fact that it would obviously deprive counsel of potentially important information until a mitigation hearing was imminent, it does not appear that the provision was inherently prejudicial since there was nothing to prevent

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[5] It appears from the record that defense counsel never actually went through with having petitioner evaluated by a psychologist. Further, it appears that, although the prosecution exercised its option to have petitioner evaluated by a psychologist, the prosecution presented no testimony or evidence at the mitigation hearing concerning that evaluation.

counsel from seeking a continuance, should they have found that necessary. Further, that deviation was of no consequence in the instant case, since it does not appear from the record that any mental examination reports were admitted or considered by the three-judge panel.

Thus, to the extent that the agreed-upon procedure for a mental examination of petitioner deviated from the procedure provided for by statute, the Court is not persuaded that counsel performed deficiently in agreeing to the procedure because nothing was demonstrably prejudicial about the agreed-upon procedure. In fact, the agreed-upon procedure provided some advantages that would not have been available to petitioner under the statutory procedure, *i.e.*, enlisting a mental specialist of defense counsel's choosing at the state's expense. Further, petitioner has not demonstrated that he was prejudiced by counsel's actions. In sum, this component of petitioner's trial counsel ineffectiveness claim is not well taken.

4.2 Failure to Obtain Psychologist for Mitigation

Petitioner argues in the second sub-part of his trial counsel ineffectiveness claim that his attorneys were constitutionally deficient for failing to obtain an independent psychologist to evaluate petitioner and assist with mitigation proceedings. Petitioner reasons that an independent psychologist could have assisted petitioner in presenting a coherent mitigation theory by explaining petitioner's behavior in the context of his psycho-social development. *Petition*, at ¶56(b, c).

As the Court noted in its discussion above, defense counsel apparently planned early on in the trial preparations, before petitioner waived his right to a jury trial and changed his plea to guilty pursuant to a plea agreement, to have petitioner evaluated by a psychologist or psychiatrist of their

choosing in the event that the trial proceeded to a mitigation phase. It appears from the record, however, that defense counsel never had petitioner evaluated, and, accordingly, that they presented no evidence at the mitigation hearing about petitioner's mental health. In an affidavit attached in support of petitioner's state court postconviction action, an attorney who had assisted petitioner with his postconviction action remarked that trial counsel had decided against a mental examination of petitioner based on their assessment that he did not suffer from a mental disease or defect. *See* Exhibit LL to the Return of Writ, Amended Petition To Vacate, at Exhibit F (Affidavit of Scott P. Kenney).

The statutory mitigating factors that are to be weighed against any aggravating circumstances of which a defendant was convicted are set forth in R.C. §2929.04(B). That section provides in relevant part --

> [T]he court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:
>
> (1) whether the victim of the offense induced or facilitated it;
>
> (2) whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
>
> (3) whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity

to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) the youth of the offender;

(5) the offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) if the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) any other factors that are relevant to the issue of whether the offender should be sentenced to death.

R.C. §2929.04(B).

It appears from the mitigation transcript that trial counsel sought to establish four of the mitigating factors listed above -- namely, that petitioner was operating under duress or coercion at the hands of his co-defendant, Clyde Daniel Wesley; that petitioner was only 23 years old at the time of the offense; that petitioner lacked a significant criminal history; and that petitioner was not the principal offender. To that apparent end, trial counsel called the probation officer who had prepared petitioner's presentence investigation report, as well as the Guernsey County Clerk of Courts, to establish that petitioner lacked a significant criminal history. Although the probation officer later rebutted his own testimony during the state's case, revealing the existence of a few prior convictions that initially had been

overlooked, the trial court ultimately determined that petitioner lacked a significant criminal history. Trial counsel then called upon petitioner's family members, friends, teachers, and employers to testify about petitioner's childhood environment and background, general nature, social relationships, educational experience, and work history. Finally, petitioner gave an unsworn statement, the crux of which was that Clyde Daniel Wesley, and not petitioner, was the gunman who killed Mrs. Stout. Trial counsel submitted several exhibits that consisted of petitioner's social history, a summary of the mitigation investigator's survey of petitioner's hometown, as well as a myriad of questionnaires by family members and friends who did not testify at the mitigation hearing -- albeit, hastily prepared and submitted, by all accounts.

Petitioner has not demonstrated that counsel's decision not to present psychological evidence at the mitigation hearing fell outside the wide range of reasonable professional norms. Defense counsel decided not to have petitioner evaluated based on their assessment that he did not suffer from a mental disease or defect. *See* Exhibit LL to the Return of Writ, Amended Petition To Vacate, at Exhibit F (Affidavit of Scott P. Kenney). Put another way, that petitioner was not evaluated by a psychologist of defense counsel's choosing was the result -- not of neglect, oversight, or lack of investigation -- but of a tactical decision based on trial counsel's assessment that petitioner did not suffer from a mental disease or defect and that there was little to gain by having a psychologist testify at the mitigation hearing. It is reasonable for counsel to forgo a mental evaluation of their client if nothing suggested to them that a mental examination was warranted or if the client did not indicate that his attorneys should offer any mental health issues. *See Mills v. Singletary,* 161 F.3d 1273, 1286 (11th Cir. 1998), *cert. denied,* 528 U.S. 1082 (2000); *see also Thomas* v. *Gramley,* 951 F.Supp. 1338, 1344-45 (N.D. Illinois 1996)

(conversations with petitioner and family members gave counsel no reason to believe that petitioner suffered from mental or emotional disturbance), *aff'd Thomas v. Gilmore*, 144 F.3d 513 (7th Cir. 1998), *cert denied*, 525 U.S. 1123 (1999). It is also reasonable for counsel to forgo the pursuit and presentation of psychological evidence if undertaking to establish mental or emotional impairment would be inconsistent with the mitigation theory that defense counsel has charted. *See Mills v. Singletary*, 63 F.3d 999, 1024-25 (11th Cir. 1995), *r'hng and suggestion for r'hng en banc denied*, 70 F.3d 1288 (11th Cir. 1995), *cert. denied*, 517 U.S. 1214 (1996).

Petitioner argues, (and sought to establish through affidavits and exhibits in support of his postconviction action), that testimony by a psychologist demonstrating that petitioner suffered from alcohol and marijuana dependence, from dependent personality disorder and immature personality disorder, and from borderline verbal intellectual ability would have contributed to counsel's mitigation strategy of showing that petitioner possessed no intent to kill or harm anyone and was especially susceptible to the influence of Clyde Daniel Wesley. Although there may be some merit to petitioner's assertion, the most that it demonstrates is that counsel could have done more, which is almost always the case.

Dr. James R. Eisenberg evaluated[6] petitioner on September 9, 1988, and set forth his conclusions in an affidavit attached in support of petitioner's postconviction

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[6] In addition to conducting a clinical interview, Dr. Eisenberg administered three psychological tests: (1) the Wechsler Adult Intelligence Scale -- Revised; (2) the Minnesota Multiphasic Personality Inventory; and (3) the Rorschach Inkblot Test.

action.[7] From the tests, Dr. Eisenberg concluded that petitioner had a full scale IQ of 80, placing him at the lowest end of the low average range; that petitioner had an adolescent profile, characterized by a need for immediate gratification and addictive qualities; and that petitioner was incapable of dealing with complex situations and was therefore prone to be a follower rather than a leader. Dr. Eisenberg diagnosed petitioner as having the following disorders: alcohol dependence, cannabis dependence, personality disorders not otherwise specified (dependent personality disorder and immature personality disorder), and borderline verbal intellectual ability. Based on all of the above, Dr. Eisenberg was of the opinion that petitioner was quite dependent on others and was especially vulnerable to the influence of others. Dr. Eisenberg was further of the opinion that all four disorders noted above, as well as petitioner's troubling childhood environment, marked by alcoholism and sexual abuse, could have been considered as relevant mitigating factors under R.C: §2929.04(B)(7).

The Ohio Supreme Court has recognized the mitigation value of the sort of testimony that Dr. Eisenberg could have provided. Although Dr. Eisenberg's diagnoses would not have qualified as a mental disease or defect that prevented petitioner from appreciating the criminality of his conduct or from conforming his conduct to the requirements of the law, *see* R.C. §2929.04(B)(3) -- the reason, apparently, that trial counsel chose not to present psychological evidence at the mitigation hearing -- Dr. Eisenberg's testimony may very well have established mitigating factors set forth in R.C. §§ 2929.04(B)(2) and (B)(7). With respect to the duress/coercion factor set forth in §2929.04(B)(2), the Ohio Supreme Court noted in *State v. Carter*, 72 Ohio St. 3d 545 (1995), that strong domination by another over the defendant,

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[7] *See* Exhibit LL to the Return of Writ, Amended Petition to Vacate, at exhibit B.

so as to cause the defendant to act other than he ordinarily would, is mitigating in nature. In so holding, the court noted that the defendant's low intelligence and his susceptibility to the influence of others would be relevant to determining the existence of coercion. *See also State v. Woods*, 48 Ohio St. 2d 127 (1976), *vacated on other grounds*, 438 U.S. 910 (1978). The Ohio Supreme Court has also demonstrated a willingness to attach some degree of weight to evidence of psychological problems that do not rise to the level of "mental disease or defect" under R.C. §2929.04(B)(3). *State v. Spivey*, 81 Ohio St. 3d 405 (1998); *State v. Awkal*, 76 Ohio St. 3d 324 (1996).

With respect to the first prong of the *Strickland* test, it certainly could be said that trial counsel could have been more thorough in their preparation and more ordered in their presentation with respect to the mitigation hearing. The constitutional inquiry, however, is not whether counsel could have done better, or whether petitioner could have benefitted from the best possible defense; but rather, whether counsel made errors or omissions so serious that counsel were not functioning as the advocates guaranteed by the Sixth Amendment. *See Laws v. Armontrout*, 863 F.2d 1372, 1384 (8th Cir. 1988)("[C]ounsel could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984))), *cert. denied*, 490 U.S. 1040 (1989). As for the prejudice prong of *Strickland*, it would be easy enough to speculate that the substance of Dr. Eisenberg's testimony could have mitigated petitioner's culpability by showing that petitioner acted under duress or coercion at the hands of Clyde Daniel Wesley. But the *Strickland* Court took great pains to caution against speculation borne of hindsight, warning that, "[a] fair assessment of attorney performance requires that every effort

be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland, supra*, 466 U.S. at 689. In the instant case, the record demonstrates that defense counsel made a reasonable decision not to present testimony by a psychologist based on their assessment that petitioner did not suffer from a mental disease or defect and that petitioner would not benefit from evidence that he was dependent on drugs and alcohol, was of low intelligence, and was too easily influenced by others. Counsel's decisions and strategic course cannot be criticized in hindsight if there was some reasonable basis for those decisions.

4.3 Failure To Spend More Time Preparing For Mitigation

In this sub-part, petitioner argues that his trial attorneys were constitutionally ineffective for failing to begin preparation for the mitigation phase until it was too late adequately to investigate petitioner's background, provide a social history to a psychologist, and develop a mitigation theory. Petitioner complains that, according to the docket, defense counsel did not request the services of a social worker/mitigation specialist until August 30, 1984, and that mitigation preparation did not begin until September 6, 1984. *Petition*, at ¶56(d). Petitioner asserts that trial counsel were also ineffective for not requesting a continuance following his guilty plea to allow adequate time to prepare for the mitigation phase. *Petition*, at ¶56(e). Petitioner entered his guilty pleas on September 17, 1984; following a hearing to ensure that there was a factual basis for petitioner's guilty pleas, the mitigation phase began on September 20, 1984.

As the Court noted earlier, chief among counsel's responsibilities is the duty to investigate. "[C]ounsel has a duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary." *Strickland, supra,* 466 U.S. at 691; *Sims v. Livesay,* 970 F.2d 1575, 1580-81 (6th Cir. 1992); *see also O'Hara v. Wigginton,* 24 F.3d 823, 828 (6th Cir. 1994); *Workman v. Tate,* 957 F.2d 1339, 1345-46 (6th Cir. 1992). The importance of competent representation during the penalty phase of a capital trial cannot be understated, especially with respect to the duty to investigate, since, as a practical matter, all that stands between a defendant who has been convicted of a capital specification and death is whatever mitigation evidence he can muster. *Mapes v. Coyle,* 171 F.3d 408, 426 (6th Cir. 1999).

Petitioner's attorneys filed an application on August 30, 1984, prior to petitioner's waiving his right to a jury trial and entering his guilty pleas, to engage the services of a social worker to assist in preparation for the mitigation phase, should a mitigation phase be necessary. According to affidavits attached to petitioner's amended postconviction action,[8] a social worker, Debbie Starkey, and a social work intern, Charlotte Gilbert, met with one of petitioner's trial attorneys, Mr. Tingle, on September 6, 1984. Ms. Starkey went on to state that, after initially contemplating the gathering of petitioner's background information to present to a psychologist prior to a psychological evaluation of petitioner, one of petitioner's trial attorneys, on September 10, 1984, directed Starkey and Gilbert to focus on gathering information from the Cannonsburg, Pennsylvania community where petitioner lived.

Ms. Gilbert interviewed petitioner for the first time on that same day, and then departed for Cannonsburg. Between September 11th and September 13th, Ms. Gilbert distributed and gathered questionnaires that she and Ms. Starkey had

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[8] *See* Exhibit LL to the Return of Writ, Amended Petition to Vacate, at exhibits D and E.

prepared among family members, friends, and various acquaintances. During that time, Ms. Starkey also collected petitioner's school and hospital records. From September 14th through September 18th, Ms. Starkey and Ms. Gilbert sifted through the questionnaires and records, and prepared a social history for petitioner, as well as a summary of the information they had gathered from Canonsburg. During that period of four days, they also finalized a witness list for the mitigation hearing with Mr. Tingle.

On September 19th, Ms. Starkey and Ms. Gilbert met with Mr. Tingle and, for the first time, petitioner's other defense attorney, Mr. Stephens. According to Ms. Starkey, petitioner's attorneys wanted all references to drugs and alcohol deleted from the social history summary that had been prepared, until counsel realized that the presentence investigation report contained similar references anyway. Ms. Starkey and Ms. Gilbert assert that they urged petitioner's attorneys to have petitioner evaluated by psychologist, because Ms. Starkey and Ms. Gilbert were of the opinion that petitioner was of borderline intelligence and that this was an important fact.

On September 20, 1984, the day that the mitigation hearing began, Ms. Starkey, Ms. Gilbert, Mr. Tingle, and Mr. Stephens met with petitioner's witnesses, with Ms. Starkey and Ms. Gilbert asking each of them five or six questions. On that same day, Mr. Tingle and Mr. Stephens undertook to prepare petitioner to give his unsworn statement at the mitigation hearing; according to Mr. Starkey, that preparation consisted of Mr. Stephens "ranting and raving" at petitioner and of focusing petitioner's statement to point to Clyde Daniel Wesley as the principal offender. Both Ms. Starkey and Ms. Gilbert stated in their affidavits that they did not feel that they had had enough time to prepare for petitioner's mitigation hearing.

Petitioner has not demonstrated either that his attorneys were constitutionally deficient with respect to the amount of time that they devoted to preparing for his mitigation hearing, or that he suffered any prejudice as a result of their actions. There is no hard and fast rule about when mitigation preparation should begin; that will vary based on the nature of the case, counsel's experience, and the mitigation theory to be presented. Petitioner asserts that trial counsel began preparing for the mitigation phase too late adequately to investigate his background or to present his social history to a psychologist. But even a cursory review of the mitigation transcript and petitioner's postconviction exhibits reveals that there was no shortage of testimony or physical evidence describing petitioner's background and social history. Moreover, there was no need to prepare background information or a social history for a psychologist, since trial counsel elected against having petitioner evaluated and against attempting to show that petitioner suffered from a mental disease or defect.

Finally, with respect to petitioner's argument that trial counsel did not have enough time to develop a mitigation theory, the record amply demonstrates that trial counsel sought primarily to establish that Clyde Daniel Wesley, and not petitioner, was the principal offender, and in addition, to demonstrate that petitioner's culpability could be mitigated by the fact that he was only 23 years old at the time of the offense, the fact that he lacked a significant criminal history, and the fact that his actions that day were the result of duress and coercion at the hands of Clyde Daniel Wesley. In other words, trial counsel advanced a mitigation theory which, while perhaps not as forceful or articulate as it could have been, was nonetheless discernable. Thus, petitioner has not shown either that his trial attorneys were constitutionally deficient in the amount of time that they devoted to preparing for the mitigation phase.

4.4 Selection And Preparation Of Mitigation Witnesses

Petitioner asserts in this sub-part that this trial attorneys were constitutionally ineffective for not selecting the best witnesses to testify at the mitigation hearing, and for not better preparing the witnesses who did testify. *Petition,* at ¶¶56(f, g). Petitioner reasons that the failure to present the best witnesses, along with the failure to prepare better the witnesses who did testify, resulted in an inaccurate, incomplete depiction of his background, and also prevented the introduction of relevant mitigation evidence. Specifically, petitioner argues that counsels' deficient performance prevented the thee-judge panel from learning about petitioner's family dysfunction, including history of alcoholism and sexual abuse; parental dysfunction and chaos; alcohol and marijuana dependency; personality disorders not otherwise specified (dependent and immature personality); impact of borderline intellectual and verbal ability; impact of the history of petitioner's interaction and relationship with Clyde Daniel Wesley; petitioner's ability to peacefully adjust to incarceration; and his environmental influences. Petitioner's arguments are not well taken.

It bears repeating that attorneys enjoy a strong presumption of competence, and that an attorney's strategic choices, so long as they are based on reasonable investigation and judgment, are entitled to a great deal of deference. *Strickland, supra,* 466 U.S. at 691. The Court of Appeals for the Eighth Circuit cogently described this rule in the context of mitigation proceedings:

> [I]n order to determine what evidence might be appropriate, defense counsel has the duty to conduct a reasonable investigation. The failure to conduct any investigation of a defendant's background may fall outside the scope of

reasonable professional assistance. After a sufficient investigation, however, counsel may make a reasonable strategic judgment to present less than all possible available evidence in mitigation. A lawyer's election not to present mitigation evidence is a tactical choice accorded a strong presumption of correctness which is virtually unchallengeable.

* * *

[T]hus, a determination must be made whether the failure to put this [mitigating] evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. The only question then remaining would be whether [petitioner]'s attorney had a reasonable basis for his strategic decision that an explication of the defendant's family background would not have reduced the risk of the death penalty.

Bolender v. Singletary, 16 F.3d 1547, 1557-59 (11th Cir.), *cert. denied*, 513 U.S. 1022 (1994), *r'hng denied*, 513 U.S. 1136 (1995).

This is not a case where trial counsel failed altogether to investigate or present evidence in mitigation; rather, this is a case where petitioner challenges the witnesses that counsel called, and the extent of his background that counsel presented and explored with the witnesses who did testify. It is easy enough, after the fact, to criticize a strategy that did not succeed. But that sort of second-guessing and finger-pointing smacks of the very hindsight that *Strickland* cautioned against. In the weeks leading up to the mitigation

hearing, petitioner's attorneys, through the assistance of two social workers, collected a fair amount of information about petitioner's background through interviews, questionnaires, and records collected from petitioner's hometown, as well as summaries prepared by the social workers and the presentence investigation report compiled by the Guernsey County Probation Department. Strapped with the reality that most of the relevant character witnesses lived outside the state, counsel nonetheless called numerous family members, friends, former employers, and teachers to testify at petitioner's mitigation hearing, and introduced additional questionnaires, summaries, and records detailing petitioner's background and social relationships.

Petitioner will not be heard to complain that counsel called the wrong witnesses, and failed to prepare the witnesses who did testify; counsels' mitigation strategy reflects professional judgment based on reasonable investigation. Moreover, petitioner has not demonstrated that different or better-prepared witnesses, or that a greater push to emphasize his traumatic background, would have lessened his risk of receiving the death penalty.

4.5 Failure To Authenticate Questionnaires Submitted At Mitigation Hearing

In this sub-part, petitioner argues that his attorneys were constitutionally ineffective in failing to properly authenticate numerous questionnaires that were submitted in the mitigation proceedings on behalf of people from petitioner's hometown who did not testify during the mitigation proceedings. *Petition*, at ¶56(k). According to petitioner, this resulted in the trial court giving very little if any weight to the questionnaires or to the survey prepared by the social workers.

Following petitioner's unsworn statement at his

mitigation hearing, his attorneys offered into evidence, among other documents, three exhibits consisting of approximately sixty questionnaires completed by members of petitioner's hometown community in response to canvassing by social workers on behalf of petitioner, a summary of the results of that survey prepared by the social workers, and petitioner's social history compiled by the social workers. (Mitigation transcript, 09/20/84, at 505-506). The prosecution objected on grounds that they had not received copies in advance, that the documents were not properly identified or authenticated, and that they amounted to improper hearsay. *Id.* at 506. After noting concerns over the irregularity of the documents, the trial court ultimately erred on the side of allowing the defendant every opportunity to present matters in mitigation and reluctantly admitted the documents -- albeit, with one of the three judges dissenting. *Id* at 507-509.

It is apparent from the transcript and the trial court's sentencing opinion that what little weight the trial court ultimately accorded the documents was due as much to the unpersuasive nature of those documents as to the fact that they were not properly identified or authenticated. Although the documents were admittedly of questionable value, the Court is not persuaded either that their introduction harmed petitioner or that calling each of the people who completed questionnaires would have benefitted petitioner. Thus, the Court does not agree with petitioner's argument that his trial attorneys were constitutionally ineffective for failing to properly authenticate those questionnaires or that petitioner was prejudiced by counsels' actions. Further, with respect to the decision even to rely on those questionnaires and summaries, trial counsel made a tactical decision that the information contained in those documents might have been of some value to petitioner but that calling each of those witnesses would have resulted in the presentation of cumulative evidence which would have provided no benefit

to petitioner, *id.* at 505, and that decision is entitled to deference. For these reasons, the Court concludes that this allegation of trial counsel ineffectiveness is without merit.

4.6 Failure To Prepare Petitioner Adequately To Give Unsworn Statement

Petitioner argues in this sub-part of his fourth claim for relief that his trial attorneys were constitutionally ineffective for failing to prepare him adequately to give his unsworn statement. Petitioner asserts that counsel steered him into focusing entirely on the shooting of Mary Jane Stout, and specifically, on fingering Clyde Daniel Wesley as the triggerman, at the expense of comments relating to any other mitigating factors. *Petition*, at ¶56(g).

Following the testimony of the many witnesses that trial counsel had called to testify about petitioner's childhood, family and social relationships, educational record, and work history, petitioner gave an unsworn statement on his behalf. According to affidavits attached to petitioner's amended postconviction action, trial counsel had spent that morning preparing petitioner to give his statement, designing the statement to stress that Clyde Daniel Wesley shot and killed Mrs. Stout, *i.e.*, that Wesley, not petitioner, was the principal offender. (Exhibit LL to Return of Writ, Amended Petition to Vacate, at exhibits D and E). In his statement, petitioner explained the events that unfolded, highlighting that Wesley had shot at a passing driver while they were driving west on interstate 70, that it was Wesley who wanted to stop at the Stout's home, that it was Wesley who feigned making a telephone call, that it was Wesley who took charge of burglarizing the house and who instructed petitioner to hold the Stouts at gunpoint, and that, although petitioner shot Norman Stout, it was Wesley who picked up the same gun and fatally shot Mrs. Stout. (Mitigation transcript, 09/20/84, at 500-503). Petitioner described himself

as scared, uncertain, and shaky, while painting Wesley as aggressive and assured. *Id.* Petitioner concluded his remarks by expressing remorse for the events and for his role in them. *Id* at 503.

The Court is not persuaded that petitioner's attorneys were constitutionally ineffective in preparing him to make his unsworn statement. First, it is evident from the record that counsels' strategy for petitioner's unsworn statement was to establish Clyde Daniel Wesley as the principal offender in the murder. That theme, as planned and delivered, was not only consistent with, but essential to, counsels' mitigation theory that petitioner was not the gunman who killed Mrs. Stout and that petitioner's role in the events that unfolded at the Stout home was as a scared follower, not a ruthless culprit. The social workers' affidavits attached to petitioner's state postconviction action demonstrate that the attorneys, if nothing else, were tenacious and firm in their preparation of petitioner, and were convinced that the trial court's decision whether to impose life or death hinged on whether petitioner could demonstrate that he was not the principal offender. The record before the Court reveals no glaring omission or neglect on counsels' part. Finally, petitioner has not demonstrated, and it is not otherwise evident to the Court, what more could have been accomplished by petitioner's unsworn statement, had counsel spent more time or selected a different approach.

Mindful that the inquiry is not what more counsel could have done or how petitioner may have benefitted from a different approach, but only what was constitutionally compelled, the Court concludes that petitioner's attorneys did enough. In other words, the Court is not persuaded that petitioner's attorneys were constitutionally ineffective in preparing petitioner to make his unsworn statement, or that petitioner was prejudiced by their actions.

4.7 Failure To Object To Presentence Report, Victim Impact, Prosecutor's Comments

In the final sub-part of this claim, petitioner asserts that his trial attorneys were constitutionally ineffective for failing to object to the presentence investigation report -- which contained a victim impact statement, otherwise inadmissible "other acts" evidence, and a recitation of facts not in evidence. *Petition,* at ¶57. Petitioner also challenges his attorneys' failure to object to a separately filed victim impact statement, or to the prosecutor's comments upon the unsworn nature of petitioner's statement. *Petition*, at ¶ 58-59.

With respect to petitioner's contention that his attorneys were ineffective for requesting, and then not objecting to the admission of, a presentence investigation report, the Court concludes that his argument is without merit. As noted earlier, R.C. §2929.03(D)(1) requires that a presentence investigation report be prepared for the mitigation phase, but only upon the request of the defendant. That section further states that, should the defendant request the report, copies of the presentence investigation report must be provided to the defendant, prosecutor, trial judge, and the jury, if the case was tried before a jury. Recent Ohio Supreme Court law dictates that it is not constitutionally ineffective for an attorney to utilize §2929.03(D)(1) to request a presentence investigation report. *State v. McNeil,* 83 Ohio St. 3d 438, 451 (1998); *State v. Hutton,* 53 Ohio St. 3d 36, 42-43 (1990). In fact, the Court is aware of one state judge who questioned the effectiveness of an attorney who did ***not*** avail himself of the often valuable procedures set forth in R.C. §2929.03(D)(1). *State v. Johnson,* 1984 WL 6368 (Ohio App. 8 Dist. Dec. 13, 1984)(Russo, J., dissenting), at *22 n.1. The Court further finds, after reviewing the record, that the information contained in the presentence investigation report was essentially cumulative to the information that defense counsel discovered in their

own investigation and subsequently presented during the mitigation hearing.

As for petitioner's argument that his attorneys were ineffective for failing to object to the separately filed victim impact statement, the Court concludes for several reasons that this argument is without merit. In *Payne v. Tennessee*, 501 U.S. 808, 826 (1991), the United States Supreme Court held that the Eighth Amendment erects no *per se* bar if a State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject. "'A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id.* In so holding, the Court expressly rejected the defendant's *stare decisis* arguments and overruled two previous decisions which had prohibited, on Eighth Amendment grounds, the admission of victim impact evidence and prosecutorial arguments on that subject in the capital sentence process. *Id.* at 824-25, *overruling, Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989).

The *Booth* and *Gathers* decisions presumably provide the basis for petitioner's argument that his attorneys were ineffective for not challenging the admission of the victim impact evidence. Petitioner's conviction became final when the United States Supreme Court denied his petition for a writ of *certiorari* on February 22, 1988. *See Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)(holding that, if federal question is involved, process of direct review includes the right to petition the United States Supreme Court for writ of *certiorari*). *Booth* was decided in 1987; *Gathers* was decided two years later in 1989. Thus, *Booth's* Eighth Amendment prohibition against the admission of victim impact evidence was in effect before petitioner's conviction became final; concomitantly, petitioner's conviction was final before *Payne*

was decided, which decision lifted the Eighth Amendment bar against victim impact evidence. Thus, at the time when petitioner's conviction became final, it was unconstitutional to use victim impact statements in the penalty phase of a capital murder case. This fact does not entitle petitioner to relief, however, because even assuming that admission of the victim impact evidence was improper under *Booth and Gathers, Payne* is applicable -- not *Booth* and *Gathers.*

Those circuits which have squarely addressed this issue have agreed that *Payne* precludes the finding of a constitutional violation based solely on the admission of victim impact evidence, ***even if*** the state court conviction was final before *Payne* was decided. *See Wiley v. Puckett*, 969 F.2d 86, 105 (5th Cir. 1992); *Pierson v. O'Leary*, 959 F.2d 1385, 1390-91 (7th Cir.), *cert. denied*, 113 S.Ct. 168 (1992); *Horton v. Zant*, 941 F.2d 1449, 1466 (11th Cir. 1991), *cert. denied*, 503 U.S. 952 (1992). In *Teague v. Lane*, 489 U.S. 288, 310 (1989), the Supreme Court held that a new rule of constitutional law established after a petitioner's state conviction has become final may not be used to attack the state conviction in habeas corpus unless the new constitutional principle falls within two narrow exceptions. Although it may not seem so at first glance, the retroactive application of *Payne*, upon closer examination, is entirely consistent with *Teague v. Lane, supra. Teague's* nonretroactivity rule is rooted exclusively in the interest of preserving the finality of state criminal convictions. *Lockhart v. Fretwell*, 506 U.S. 364 (1993). A habeas corpus petitioner, however, has no corresponding interest in the finality of the state court judgment against him, as evidenced by the fact that the very purpose of his habeas petition is to upset that judgment. *Id.* In other words, unlike the States, habeas corpus petitioners are not entitled any benefit under *Teague*. Rather, *Teague* limits the authority a petitioner may use to attack his conviction; it does not extend any benefit whatsoever to habeas corpus applicants.

Thus, the issue whether the victim impact evidence introduced during petitioner's capital sentencing proceeding is governed by *Payne*.[9] Under *Payne*, the *per se* Eighth Amendment bar against the admission of victim impact evidence is lifted, and the inquiry is limited to whether the victim impact evidence was so unduly prejudicial as to render petitioner's trial fundamentally unfair. *Payne*, 501 U.S. at 825. The victim impact evidence presented in petitioner's case did not rise to that level, consisting essentially of a description in the presentence investigation report of Mr. Stout's colorless recollections of the events up until the point when he was shot, and a separately filed victim impact statement consisting of a physician's detached explanation of the nature and lingering effects of the wounds that Mr. Stout had suffered and of the fatal and non-fatal wounds that Mrs. Stout received.

As to the testimony presented during the guilt and sentencing phases that even remotely touched upon victim impact evidence, that testimony cannot credibly be characterized as especially moving or colorful, to the extent that this Court can assess as much from a cold transcript. With the exception of isolated references to the fact that Mrs. Stout was 54 years old, and possibly suffering from a bout of the flu at the time of the incident, the prosecutor made no real remarks akin to victim impact evidence in his mitigation phase closing statement. Under the *Payne* standard, therefore, the Court is not persuaded that the victim impact evidence of

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[9] Moreover, the Court of Appeals for the Fourth Circuit has held that, even assuming *Booth* would extend retroactively to benefit a defendant sentenced before *Booth* was decided, the fact remains that *Payne*, which permits the admission of victim impact evidence, would apply to any re-sentencing of the defendant. *Washington v. Murray*, 952 F.2d 1472, 1480-81 (4th Cir. 1991).

which petitioner complains was unduly prejudicial. For this reason, the Court cannot find that petitioner's attorneys were constitutionally ineffective in not objecting to that evidence, even assuming the trial court would have sustained the objection.

Beyond the applicability of *Payne* in barring relief for petitioner on his victim impact evidence claim, the Court further finds that there is no indication whatsoever that the trial court gave weight to the victim impact evidence in determining that the aggravating circumstances outweighed the mitigating factors. In *Cooey v. Anderson*, 988 F.Supp. 1066 (N.D. Ohio 1997), the petitioner sought habeas corpus relief on, among other grounds, the admission of victim impact statements during the penalty phase of his trial. After assuming, without discussing, that *Payne* was applicable to petitioner's case, which had become final on direct review before *Payne* was decided, the district court concluded that petitioner was not entitled to relief on his victim impact evidence claim because he could not demonstrate, and the record did not otherwise suggest, that the victim impact statements were considered by the trial court when it imposed the death sentences.[10] *Cooey*, 988 F.Supp. at 1090-1091.

Under that standard, the Court cannot find that petitioner's attorneys were constitutionally deficient for not objecting to the admission of victim impact statements during the penalty phase. First, it bears mentioning that, under R.C. §2929.12(B)(2), the trial court is required to consider physical, psychological, and economic impact on the victim(s) in non-capital felony criminal sentencing. In light of the fact that petitioner was also sentenced for the

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[10] The petitioner was also convicted of and sentenced on non-capital felonies. *Cooey*, 988 F.Supp. at 1089-1091.

attempted murder of Norman Stout, it would have been disingenuous for counsel to have objected to the admission of any victim impact statement from Norman Stout.

The Court further finds in the instant case no indication whatsoever that the trial court relied on or even considered the fleeting victim impact statements that were admitted as part of the presentence investigation report and as a separate piece of evidence, in sentencing petitioner to death on the aggravated murder charge. The Court has reviewed the announcement made by the trial court at the conclusion of the penalty phase, as well as the trial court's written opinion, and finds no mention of the victim impact statements. Just prior to imposing a sentence of death for the murder of Mary Jane Stout, the trial court announced its finding beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors, and stated that it considered, in addition to that finding, the argument presented by counsel, the petitioner's statement, and the presentence investigation.[11] In other words, the Court is not persuaded that the trial court relied on the victim impact statements in imposing the death sentence. Thus, the Court is not persuaded that petitioner was prejudiced by their admission into evidence.

Finally, with respect to petitioner's argument that his attorneys were constitutionally ineffective for not objecting to comments by the prosecutor during his penalty phase closing argument regarding the unsworn nature of petitioner's statement, the Court concludes that this claim is without merit. Although these comments are certainly questionable at best, recent Ohio Supreme Court law

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[11] The Court is mindful, however, that there appears to be a page missing in the transcript from the trial court's pronouncement of sentence; that portion of the sentencing transcript skips from page 546 to 548.

confirms that an attorney may reasonably elect not to interrupt opposing counsel's closing remarks. *See State v. Keene,* 81 Ohio St. 3d 646, 668 (1998).

More significant to the Court, however, is that petitioner's case was tried to a three-judge panel instead of a jury. It is reasonable to presume that a trial panel, as opposed to a jury, will be scrupulous enough to avoid admitting or considering improper evidence in its sentencing decision. *See State* v. *Lott,* 51 Ohio St. 3d 160, 176 (1990); *see also State v. Post,* 32 Ohio St 3d 380, 383-84 (1987)(holding that error in admitting victim impact statement did not warrant reversal because the case was tried before a three-judge panel rather than a jury). Such has been the state of the law in Ohio since 1968. In *State v. White,* 15 Ohio St. 2d 146, 151 (1968), the Ohio Supreme Court noted that it would indulge "in the usual presumption that in a bench trial in a criminal case the [trial] court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." Federal circuits considering this question indulge the same presumption. *United States v. Busch,* 758 F.2d 1394, 1398 (10th Cir. 1985); *United States v. Impson,* 562 F.2d 970, 971 (5th Cir. 1977), *cert. denied,* 434 U.S. 1050 (1978); *United States ex rel. Placek v. Illinois,* 546 F.2d 1298, 1304-1305 (7th Cir. 1976). This reasoning is applicable to all three of petitioner's challenges -- namely, that his attorneys were ineffective for not objecting to admission of the presentence investigation report, victim impact statements, and the prosecutor's comments regarding the unsworn nature of petitioner's statement in mitigation. The record is devoid of any indication, not to mention affirmative evidence, that the trial court relied upon improper "other acts" evidence, victim impact statements, or the prosecutor's statements impugning the unsworn nature of petitioner's statement in mitigation. For all of these reasons, the Court rejects petitioner's argument that his attorneys were constitutionally deficient for not objecting to this evidence.

Fifth Claim for Relief

In his fifth claim for relief, petitioner asserts ineffective assistance of appellate counsel on direct appeal to the Court of Appeals. Specifically, petitioner asserts that his appellate attorneys were constitutionally deficient for failing to raise the following issues on appeal:

5.1 That the trial court erred in failing to file findings of fact and conclusions of law in connection with its rejection of petitioner's motion to suppress statements;

5.2 That the trial court erred in finding a sufficient factual basis for petitioner's guilty plea since there is insufficient evidence demonstrating that petitioner possessed specific intent to kill Mrs. Stout;

5.3 That the trial court abused its discretion in failing to grant petitioner's request for a change of venue;

5.4 That the trial court abused its discretion in accepting petitioner's guilty plea without explaining the nature of the charge as required by state rules of criminal procedure and constitutional law;

5.5 That the prosecutor made improper

comments regarding the unsworn nature of petitioner's statement in mitigation;

5.6 Appellate counsel's failure to ensure that the presentence investigation report was made a part of the record on appeal; and

5.7 That trial counsel had been ineffective for failing to fully develop the record on the involuntary nature of petitioner's guilty plea.[12]

The Court will discuss the controlling standard for claims of ineffective assistance of appellate counsel and then address each of petitioner's allegations separately.

The Strickland test applies to appellate counsel. *Burger v. Kemp*, 483 U.S. 776 (1987). Counsel must provide reasonable professional judgment in presenting the appeal. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). "'[W]innowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986)(quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). The Court of Appeals for the Sixth Circuit has identified the following considerations that

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12 As the Court noted in its earlier procedural default order, the habeas corpus petition includes two claims designated as the "fifth claim for relief." The first "fifth claim" is comprised of the allegations designated by the Court as 5.1 through 5.6. The only allegation of the second "fifth claim" that was properly presented to the state courts, and that is entitled to a review on the merits by this Court, is designated as 5.7.

ought to be taken into account in determining whether counsel on direct appeal performed reasonably competently:

(1) Were the omitted issues "significant and obvious?"
(2) Was there arguably contrary authority on the omitted issues?
(3) Were the omitted issues clearly stronger than those presented?
(4) Were the omitted issues objected to at trial?
(5) Were the trial court's rulings subject to deference on appeal?
(6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
(7) What was appellate counsel's level of experience and expertise?
(8) Did the petitioner and appellate counsel meet and go over possible issues?
(9) Is there evidence that counsel reviewed all the facts?
(10) Were the omitted issues dealt with in other assignments of error?
(11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Mapes v. Coyle, 171 F.3d 408, 427-28 (6th Cir.), *cert. denied,* 528 U.S. 946 (1999). The Sixth Circuit cautioned, however, that this list is not exhaustive and need not produce a certain "score." *Id.* at 428. The Court will now turn its attention to each allegation of appellate counsel ineffectiveness asserted by petitioner.

5.1 Trial Court's Failure to Issue Findings/ Conclusions on Suppression Motion

Petitioner asserts that his appellate attorneys provided constitutionally deficient assistance in failing to assign as error the trial court's failure to issue findings of fact and conclusions of law in rejecting petitioner's motion to suppress statements. The Court is not persuaded that petitioner's appellate attorneys were constitutionally deficient in this regard, since petitioner's guilty plea effectively waived the ability to challenge non-jurisdictional defects on appeal.

As a general rule, a defendant who enters a plea of guilty waives all defects except lack of subject matter jurisdiction and the constitutionality of the plea itself.[13] *Ross v. Court,* 30 Ohio St. 2d 323 (1972). Thus, absent an express reservation of the right to have an issue decided on appeal,[14] a defendant who voluntarily pleads guilty waives all non-jurisdictional defects. *See, e.g., Tollett v. Henderson,* 411 U.S. 258, 267 (1973). By entering a guilty plea, petitioner waived the right to raise on appeal the propriety of the trial court's suppression rulings. *State v. Elliot,* 86 Ohio App. 3d 792, 795 (Ohio App. 12 Dist. 1993). *Huber Heights v. Duty,*

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[13] Under Ohio law, a guilty plea to capital murder, which triggers a hearing to ensure that there is a factual basis for the plea, R.C. §2945.06, does not preclude the defendant from attacking the sufficiency of the evidence on appeal. *See State v. Taylor,* 30 Ohio App.23d 252, 261 (Ohio App. 8 Dist. 1972); *State v. Place,* 25 Ohio App. 2d 158 (Ohio App. 6 Dist. 1971).

[14] It would appear that, under Ohio law, a defendant must plead no contest in order to preserve a claim of error. *See* Ohio R.Crim. P. 12(H); *State v. Ruegsegger,* 64 Ohio App. 3d 626, 629 (Ohio App. 5 Dist. 1989).

27 Ohio App. 3d 244 (Ohio App. 2 Dist. 1985). In light of the foregoing, the Court is not persuaded that petitioner's appellate attorneys were constitutionally defective for failing to assign as error the trial court's failure to issue findings of fact in connection with its rejection of petitioner's motion to suppress statements. Petitioner waived the right to appeal that issue when he pleaded guilty. Claim 5.1 is clearly without merit.

5.2 Trial Court's Determination That There Was Factual Basis for Guilty Plea

Petitioner argues that his appellate attorneys were constitutionally ineffective for failing to challenge on appeal the trial court's determination that there was a sufficient factual basis to support petitioner's guilty pleas. Specifically, petitioner asserts that specific intent is the requisite culpability and that there was insufficient evidence demonstrating that he possessed specific intent to kill the victim. Petitioner argues, therefore, that his attorneys were ineffective for not challenging on appeal the trial court's determination that there was a factual basis supporting his guilty pleas to aggravated murder and the "escaping detection" specification.

The Court is not persuaded that petitioner's attorneys were ineffective in this regard. Although the issue whether there was a sufficient factual basis supporting petitioner's guilty pleas seems, at first glance, to be an obvious issue for appeal, given the fact that petitioner steadfastly maintained, even while pleading guilty, that it was his co-defendant, Daniel Wesley, who had actually shot and killed Mrs. Stout, it cannot be said under *Strickland* that petitioner's attorneys were constitutionally deficient, or that petitioner was prejudiced, by the omission of this issue from the appeal. Initially, it bears repeating, with respect to petitioner's insistence that his co-defendant was the triggerman, that

petitioner pleaded guilty to the offense of aggravated murder and the "escaping detection" specification. That is, petitioner stood in open court and stated, under oath, that ***he*** had purposely killed Mrs. Stout and that ***he*** had done so for the purpose of escaping detection, apprehension, trial, or punishment for the offense of aggravated robbery. Moreover, there was circumstantial evidence and testimony placing the murder weapon in petitioner's hand and establishing petitioner as the one who fired the fatal shots.[15] With that in mind, the Court notes first that counsel may very well have elected not to challenge the factual basis for petitioner's guilty plea, since there was sufficient evidence from which a reasonable factfinder could have found, beyond a reasonable doubt, specific intent to kill. Evidence and testimony revealed a methodical, calculated entrance into the Stout home by petitioner and Wesley for the purpose of committing robbery; that multiple gunshots were fired into the heads of Mr. and Mrs. Stout at point blank range; that petitioner and Wesley had reason to fear that they would be identified by the Stouts; and that petitioner and Wesley fled the Stouts' home, leaving them to die. Thus, counsel may very well have determined that this issue was not stronger than the issues they ultimately presented on appeal. *Mapes, supra,* 171 F.3d at 427-28. Moreover, the issue of whether there was a sufficient factual basis supporting petitioner's guilty pleas to aggravated murder and the "escaping detection" specification were essentially dealt with in other assignments of error concerning the trial court's decision not to permit petitioner to withdraw those guilty pleas. *Id.* Having reviewed the record, the Court cannot say that the

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15 The Court is mindful, just as the state courts were, of affidavits and transcripts from the subsequent trial of Clyde Daniel Wesley, filed by petitioner in support of his motion to withdraw his guilty plea, attempting to show that Wesley had confided to a cellmate that he, and not petitioner, had actually killed Mrs. Stout.

decision not to pursue this issue on appeal was "an unreasonable one which only an incompetent attorney would adopt." *Id.* For these reasons, the Court rejects petitioner's claim that his attorneys on appeal were ineffective for failing to assign as error the trial court's determination that there was a factual basis supporting petitioner's guilty pleas.

5.3 That Trial Court Denied Request for Change of Venue

Petitioner argues that his attorneys were ineffective for not arguing on appeal that the trial court had abused its discretion in denying his motion for a change of venue. The Court is not persuaded that petitioner's appellate attorneys were constitutionally ineffective in this regard, since petitioner's guilty plea effectively waived the ability to challenge non-jurisdictional defects on appeal.

As discussed more fully in connection with claim 5.1 above, a defendant who pleads guilty waives all defects except lack of subject matter jurisdiction and the constitutionality of the plea itself. Even assuming he could plead guilty *and still* preserve issues for appeal, petitioner has not alleged, and it does not otherwise appear from the record, that his decision to plead guilty and proceed with the remaining phases of his trial was motivated by an abuse of discretion on the part of the trial court in denying his motion for a change of venue. By pleading guilty, petitioner waived his right to appeal any alleged errors pertaining to pretrial motions and venue. *See State v. Luna,* 96 Ohio App. 3d 207, 208 n.1 (Ohio App. 6 Dist. 1994). For the foregoing reasons, the Court finds that petitioner's appellate attorneys were not constitutionally ineffective for failing to challenge the trial court's decision denying the change of venue.

5.4 Trial Court's Failure to Explain Nature of Charge When Accepting Guilty Plea

Petitioner argues in claim 5.4 that his appellate attorneys were ineffective for failing to challenge on appeal the fact that the trial court accepted petitioner's guilty plea without explaining the nature of the charges to which he was pleading guilty. Although there arguably is some substance to petitioner's allegations, the Court is not persuaded that petitioner was prejudiced by appellate counsel's oversight.

The first prong of the *Strickland* test requires the Court to determine whether counsel committed an error or omission that was objectively unreasonable. The Court accomplishes this task by examining whether the issue omitted from the appeal was not only viable, but one that no competent attorney reasonably would have foregone. Under Ohio law, a trial court's responsibilities in ensuring that a guilty plea is made voluntarily are spelled out in Ohio R. Crim. P. 11(C)(2):

> In felony cases the court *** shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved ***.
>
> (b) Informing the defendant and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

The Ohio Supreme Court has held that, although strict compliance with Rule 11 (C)(2) is preferred, substantial compliance is sufficient, so long as the totality of the circumstances demonstrate that the plea was voluntary. *State v. Carter,* 60 Ohio St. 2d 34, 38 (1979); *State v. Stewart,* 51 Ohio St. 2d 86 (1977). With respect to ensuring that a defendant enters a guilty plea "with understanding of the nature of the charges," although Ohio courts have stopped short of requiring trial courts to explicitly inform the defendant of each element of the offense or to specifically ask the defendant if he understands the nature of the charge, there must be some basis in the record justifying a finding by the trial court that the defendant understands the charge. *See State v. Rainey,* 3 Ohio App. 3d 441 (Ohio app. 10 Dist. 1982); *see also State v. Blair,* 128 Ohio App. 3d 435 (Ohio App. 2 Dist. 1998)(defendant's affirmative response to whether he understood nature of attempted rape charge against him was, by itself, insufficient to support finding that he understood what state would have to prove where there was nothing in record to support finding that defendant was advised, by anyone, of what state would have to prove to convict him); *In re Flynn,* 101 Ohio App. 3d 778 (Ohio App. 8 Dist. 1995)(trial court is not required to inform defendant of each element of the offense, but must ensure that defendant understands the charge); *State v. Swift,* 86 Ohio App. 3d 407 (Ohio App. 11 Dist. 1993)(trial court is required

to clear up confusion on defendant's part as to element of crime before it can accept guilty plea).

In the instant case, it appears that the, trial court substantially complied with Ohio R. Crim. P. 11(C)(2) when accepting petitioner's guilty pleas. The trial court informed petitioner of the constitutional rights to which he was entitled and ensured that he understood he was waiving those rights; inquired whether petitioner was under the influence of drugs, alcohol, or mental defect that might impair his voluntariness; advised petitioner of the maximum penalties that he faced; inquired whether petitioner's guilty pleas had been obtained through promises, inducements, or threats; and, inquired whether petitioner had discussed his plea and was satisfied with his attorneys. (Mitigation transcript, at 11-18). The trial court did not inquire into petitioner's educational background in ascertaining whether he was capable of understanding the charges to which he was pleading guilty or the consequences of his guilty pleas. The trial court also failed to inform petitioner of the elements of the charges to which he was pleading or to inquire whether he understood the charges. The trial court did, however, inquire of petitioner's attorneys whether they had explained the elements of the offenses to petitioner. (Mitigation transcript, at 11). From the plea colloquy as a whole, there, appears to be a basis in the record justifying the trial court's finding that petitioner entered his guilty pleas "with full knowledge of the nature of the accusation and the consequences of the pleas," (Mitigation transcript, at 23), though that basis appears to have been somewhat scant.

Further, there were intimations at the time that petitioner entered his guilty pleas, as well as outright declarations in his subsequent appeals and collateral attacks, that petitioner did not fully grasp the nature of the charges to which he was pleading guilty. During the plea colloquy, when the trial court asked petitioner whether he was in fact

guilty of the aggravated murder charge and specifications one and four to that charge, petitioner did not immediately answer, prompting defense counsel to interject:

> MR STEPHENS: One moment, Your Honor. Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of the his right to present evidence at a later time relative to his conduct, but he'll respond to that.

(Mitigation transcript, at 18). After petitioner's pleas had been accepted and petitioner had been sentenced to death, when petitioner later sought to withdraw his plea and to attack his conviction and sentence in postconviction, he asserted, (as he continues to assert here), that he did not understand that he was admitting to the actual shooting of Mary Jane Stout and that he only pleaded guilty because he was led to believe that he would be able to present evidence demonstrating that he was not the shooter, *i.e.*, the principal offender.

The trial court's failure to explain more fully the nature of the charges is fairly characterized as a non-frivolous, viable issue worthy of appeal. The trial court did not notify petitioner of the elements of the offenses to which he was pleading guilty and did not specifically ask him whether he understood the charges. The only basis supporting the trial court's finding that petitioner understood the nature of the charges was defense counsel's affirmative response to the trial court's question as to whether counsel had explained the elements of the offenses to petitioner. That petitioner denied being the actual shooter, or principal offender, was evidenced first in his reluctance to answer when the trial court asked whether he was in fact guilty of shooting Mrs. Stout and then throughout the hearing to determine whether there was a factual basis for his pleas,

when he fought to establish that it was his co-defendant, and not he, who had actually shot Mrs. Stout. The foregoing suggests that appellate counsel omitted a significant and obvious issue when they failed to assign as error the trial court's failure to explain the nature of the charges when it accepted petitioner's guilty plea. A tactical reason for not raising this issue on appeal is not readily apparent. It is likewise difficult to characterize this issue as one that a competent attorney could understandably overlook. Hence, petitioner has arguably satisfied the deficient performance prong of the *Strickland* test.

It is not enough, of course, for petitioner to demonstrate that appellate counsel's conduct fell below that of a reasonable attorney under prevailing professional norms. Petitioner must also show that, but for appellate counsel's error, the appeal would. have resulted in a different outcome. *Strickland, supra,* 466 U.S. at 694; *Tucker v. Prelesnik,* 181 F.3d 747, 754 (6th Cir. 1999). The prejudice inquiry has been defined in terms of whether counsel's errors were so egregious as to undermine reliability of and confidence in the result of the proceedings. *McQueen v. Scroggy,* 99 F.3d 1302, 1311 (6th Cir. 1996), *cert. denied,* 521 U.S. 1131 (1997); *see also Lockhart v. Fretwell,* 506 U.S. 364, 369-370 (1993). The prejudice prong serves an important function -- namely, to ensure that otherwise valid criminal judgments are not lightly overturned because of attorney error that, in the end, did not prejudice the rights of the defendant or undermine the confidence in or reliability of the proceeding. *Cf. Lockhart, supra,* 506 U.S. at 368-69 (holding that the right to effective assistance of counsel is recognized not for its own sake but because of the effect it has on ability of the accused to receive a fair trial). Under the prejudice prong, even assuming that appellate counsel could objectively be faulted for not raising the trial court's failure to explain the nature of the charges, the Court cannot find that petitioner was prejudiced by that error because it does not appear that the

state courts in this case would have accepted petitioner's argument about the trial court's failure to instruct on the elements of the offense. That is, the Court cannot find that appellate counsel's failure to raise that issue undermined the reliability of the outcome of petitioner's appeal. This Court finds that appellate counsel's failure to challenge the fact that the trial court did not explain the nature of the charges does not undermine the reliability of or confidence in the result of petitioner's appeal.

As noted *supra,* the failure of a trial court to use the exact language contained in Ohio R.Crim. P. 11(C) does not provide a basis for vacating the appeal. *See State v. Anderson,* 108 Ohio App. 3d 5, 9 (Ohio App. 9 Dist. 1995). "With respect to constitutional rights, the trial court's acceptance of a guilty plea will be affirmed if the court engaged in a meaningful dialogue with the defendant which, in substance, explained the pertinent constitutional rights "in a manner reasonably intelligible to that defendant." *Id.* (quoting *State v. Ballard,* 66 Ohio St. 2d 473, paragraph two of the syllabus (1981)). So long as the totality of the circumstances demonstrate a basis for the trial court's finding that the defendant understood the nature of the offense to which he was pleading guilty, the failure of the trial court to explicitly ask whether the defendant understood the nature of the offense does not provide a basis for attacking the constitutionality of the plea. *See, e.g., State v. Rainey,* 3 Ohio App. 3d 441, paragraph two of the syllabus (Ohio App. 10 Dist. 1982). The record reveals that the trial court received assurances from defense counsel that the nature and elements of the offense had been explained to petitioner and that petitioner was entering his guilty plea with a full understanding of the nature of the offense. That being so, it is highly unlikely that the state appellate court would have accepted petitioner's arguments about the failure of the trial court explicitly to ask him whether he understood the nature of the offense. *State v. Carter,* 60 Ohio St. 2d 34

(1974)(finding no error where trial counsel had given assurances that defendant understood nature of offense to which he was pleading guilty). Even assuming, therefore, that appellate counsel erred in not raising this issue on appeal, appellate counsel's omission did not prejudice petitioner. The Court is constrained to rejected claim 5.4.

5.5 Prosecutor's Comments About Unsworn Nature of Statement in Mitigation

Petitioner argues that his appellate attorneys were constitutionally ineffective for failing to assign as error the prosecutor's improper comments highlighting the unsworn nature of petitioner's statement in mitigation.

During closing remarks following the penalty phase of the trial, the prosecuting attorney made the following references to petitioner's unsworn mitigation statement:

"As to their purpose was in going to that house, the only stated purpose was to use the telephone but one way or the other, *if you believe the defendant's unsworn statement that he was handed this chrome colored gun by Wesley,* nevertheless the two of them went to that house armed with loaded 25 caliber automatic pistols.*** (emphasis added).

* * *

"It seems to me that all of these actions of the defendant speak louder than *anything he can say in an unsworn statement* or any statements in evidence as to what their purpose was in going to the Stout residence that night.*** (emphasis added).

* * *

"The only evidence that this defendant was other than cold and calculating at the time of that killing *was his own unsworn statement.* * * * (emphasis added).

"The only evidence to support some of the things Mr. Tingle would have you accept as the gospel truth is the unsworn statement of the defendant given here this morning, which is his right to do, but I ask you why the unsworn statement rather than being sworn to testify as every other witness? To avoid cross-examination. I had quite a few questions I would have liked to ask Mr. Stumpf about some of the these things he's saying in his statement and some of the things he's saying now in his unsworn statement, assuming he would have testified under oath in a similar manner. Why did he elect not to submit himself to cross-examination? How much weight should this Court give the unsworn statement of the defendant which was not subjected to the test of cross-examination? The Court is well able to consider that in determining what credibility to give the unsworn statement of the defendant."

(Mitigation transcript, at 525-535.)

The Court is not persuaded that petitioner's appellate attorneys were constitutionally ineffective for failing to challenge the prosecutor's remarks on appeal or that petitioner was prejudiced. The issue is a relatively weak one and thus, appellate counsel may have tactically chosen to forego the issue based on the chance that it might water down

petitioner's appeal. Prosecutors are permitted under Ohio law to comment when the defendant chooses to make an unsworn statement, although the scope of such comments is limited to explaining that the defendant's statement was not made under oath, in contrast to the testimony of all other witnesses. *State v. DePew,* 38 Ohio St. 3d 275, 285 (1988); *see also State v. Mason,* 82 Ohio St. 3d 144, 163 (1998); *State v. Davis,* 76 Ohio St. 3d 107, 119-120 (1996); *State v. Gumm,* 73 Ohio St. 3d 413, 421 (1995). Even assuming that the prosecutor's remarks in the instant case flirted with or exceeded the proper scope, any error could hardly be regarded as reversible, since petitioner was tried before a three-panel rather than a jury, thereby diminishing any possible prejudice. *See State v. Sowell,* 39 Ohio St. 3d 322, 328 (1988)(holding that erroneous admission of victim impact evidence during penalty phase did not warrant reversal because the case was tried before a three-judge panel, rather than a jury, and nothing in the panel's written opinion indicated that it relied on the improper evidence). The Court cannot find that, in failing to challenge the prosecutor's comments on the unsworn nature of petitioner's statement in mitigation, appellate counsel omitted a significant or obvious issue to petitioner's prejudice. Claim 5.5 must be rejected.

5.6 Counsel's Failure to Ensure Presentence Report Was Part of Appellate Record

Petitioner argues that his appellate attorneys failed to ensure that the presentence investigation report, which had been admitted and considered during the mitigation proceedings, was included in the appellate record. Petitioner argues that he was prejudiced by this oversight insofar as the appellate court did not have before it all of the information that was considered by the trial court in its sentencing determination. The Court is not persuaded that petitioner was prejudiced in this regard. A comparison of the trial court's sentencing opinion and the appellate court's decision reveals

that the appellate court considered and weighed the same mitigation factors, based on the same mitigation exhibits, that the trial court had considered and weighed – namely, petitioner's youth and petitioner's lack of a significant criminal history. Compare (Trial Court's Sentencing Opinion, Exh. D To Return of Writ), with (Appellate Court's Decision, Exh. T to Return of Writ). To that, the appellate court even added petitioner's remorsefulness. In the end, the appellate court concluded, just as the trial court had concluded, that the aggravating circumstances outweighed the mitigating factors. *See* (Appellate Court's Decision, Exh. T to Return of Writ, at 32). Based on the foregoing, there is no evidence demonstrating that petitioner was prejudiced by the alleged failure of his appellate attorneys to ensure that the presentence investigation report, admitted during the penalty phase, was included in the appellate record. Claim 5.6 must be rejected.

5.7 Trial Counsel's Failure to Develop Record re: Voluntariness of Plea

Finally, petitioner asserts that his appellate attorneys were constitutionally ineffective for not challenging on appeal the failure of petitioner's trial attorneys, in connection with petitioner's motion for a new trial, to develop more fully evidence demonstrating that petitioner's pleas were not entered knowingly, intelligently, or voluntarily. For reasons discussed more fully above, the Court is not persuaded that appellate counsel omitted an issue of significant and obvious strength because it is clear from the decisions of the appellate court and the Supreme Court of Ohio that they conducted a full review of the circumstances surrounding petitioner's guilty plea, and of the subsequent allegations regarding the fact that petitioner's co-defendant escaped a death sentence following his trial, and concluded that petitioner's plea had been voluntary and that petitioner was not entitled to withdraw his plea. That being so, it cannot be said that

appellate counsel unreasonably ignored an issue significantly and obviously stronger than those appellate counsel did raise on appeal, or that petitioner was prejudiced by the omission.

Sixth Claim for Relief

In his sixth claim for relief, petitioner argues that the trial court erred in its evaluation of the aggravating and mitigating circumstances by considering as aggravating factors matters which are not so designated by Ohio law and by not giving due weight to the mitigation evidence that petitioner presented. A review of the trial court's sentencing opinion reveals no constitutional error.

When a capital defendant seeks to challenge the weighing process employed by the sentencer in its determination of the death sentence, it is important to identify the constitutional boundaries that govern the weighing process. Only constitutional error warrants habeas corpus relief. "[T]he question to be decided by a federal court on petition for habeas corpus is not whether the state sentencer committed state-law error in relying on an adequately narrowed aggravating factor. (citation omitted). Rather, the federal constitutional question is whether such reliance is so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Richmond v. Lewis,* 506 U.S. 40, 48 (1992). With respect to petitioner's allegation that the trial court considered and weighed nonstatutory aggravating circumstances in its sentencing decision, it must be noted that Ohio is a "weighing" state. That is, "after a [sentencer] has found a defendant guilty of capital murder and found the existence of at least one statutory aggravating factor, it must weigh the aggravating factor or factors against the mitigating evidence." *Stringer v. Black*, 503 U.S. 222, 229 (1992). Assuming an unconstitutional aggravating factor has been considered by the sentencer in a weighing state, an appellate court may

independently reweigh the aggravating and mitigating circumstances, omitting the unconstitutional one, and determine if the sentence is nonetheless appropriate. *Stringer, supra,* 503 U.S. at 230-31; *Clemons v. Mississippi,* 494 U.S. 738, 750 (1990). To the extent that petitioner appears to be taking issue with the actual weighing process employed by the trial court, this Court's review is guided by the general rule that, the Constitution does not require that "numeric weights" be assigned to aggravating circumstances and mitigating factors; rather, the Constitution requires only that the sentencer' s discretion by sufficiently directed and limited as to prevent wholly arbitrary and capricious action. *See, e.g., Tuilaepa v. California,* 512 U.S. 967, 979 (1994)("A capital sentencer need not be instructed how to weigh any particular fact in the sentencing decision.").

The nonstatutory aggravating circumstances complained of by petitioner were cited by the trial court not as additional aggravating circumstances to be weighed against the mitigating factors, but merely as reasons why the aggravating circumstances outweighed the mitigating factors. *See e.g., Smith v. Anderson,* 104 F.Supp.2d 773, 819-820 (S.D. Ohio 2000). In its sentencing opinion, the three-judge panel found that the following statutory mitigating circumstances existed: petitioner's youth and petitioner's lack of a significant criminal history. The Court further found that the following aggravating circumstance existed: the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for other offenses committed by petitioner, to wit: aggravated robbery and attempted aggravated murder. The Court then set forth its reasons why the aggravating circumstances outweighed the mitigating factors:

1. The Court finds beyond a reasonable doubt that the Defendant was the principal offender in count one of the indictment.

2. The methodical manner in which the Defendant and his companion entered the house of the victims and assumed control of the victims. Examples:

   a. Wiping of fingerprints from the telephone.

   b. The dialogue of the Defendant with his companion.

   c. The initiative taken by the Defendant in the course of that dialogue leading up to and directing the victims into the bedroom.

   d. Continual holding [of] both victims at gunpoint by the Defendant.

   e. The Defendant shooting the male victim at close range between the eyes.

   f. The Defendant firing a second shot into the head of the male victim.

   g. The Defendant and his companion engaging in dialogue in the proximity of the male victim followed by four shots, the bullets of which were found in the head and body of Mary Jane Stout.

3. Failure of the Defendant and his companion to render assistance to the victims.

4. Defendant and his companion fleeing

immediately from the scene with the victims' automobile and personal property including firearms and ammunition.

5. The Defendant actively participated in the sale of guns stolen from the home of the victims.

6. The course of conduct of the Defendant both before and after the commission of the offense in the travel through the country with a quantity of beer and guns.

7. The Defendant's companion firing a gun into a passing vehicle in route.

8. The Defendant made no effort to disassociate himself from his companions.

9. The direct evidence of a gang operation of robbery, assault, and other crimes.

(*Id.*) It does not appear that the trial court considered or weighed against the mitigating factors an improper nonstatutory aggravating factors. Rather, the trial court provided a detailed list explaining why, in its view, the statutory aggravating circumstances outweighed the mitigating factors.

Further, even assuming that the trial court improperly considered nonstatutory aggravating circumstances, habeas corpus is not be warranted since the court of appeals and Ohio Supreme Court both conducted their own independent balancing of the aggravating circumstance against the mitigating factors, and neither appears to have considered improper, nonstatutory aggravating circumstances. *See Stringer v. Black, supra,* 503 U.S. at 230-31; *Clemons v. Mississippi, supra,* 494 U.S. at 750. The Ohio Supreme

Court, in its independent weighing of the aggravating circumstances and mitigating factors, found, as the trial court and appellate court below had found, that the single aggravating circumstance that petitioner had been found guilty of committing was that he murdered Mary Jane Stout for the purpose of escaping detection, apprehension, trial, or punishment for the other offenses of aggravated robbery and attempted aggravated murder. *State v. Stumpf,* 32 Ohio St. 3d 95, 105-106 (1987), exh.BB to return of writ. Against that aggravating circumstance, the Supreme Court undertook to weigh "all mitigating factors drawn from:" (1) nature and circumstances of the offense; (2) history, character, and background of petitioner; and (3) any factors listed in R.C. §2929.04(B). Ultimately, the Ohio Supreme Court concluded that the nature and circumstances of the offense were entitled to no weight as mitigation; and that the following six factors relating to petitioner's history, background, and character were entitled to *some* weight: history of fairly regular employment, good emotional stability, strong family background, average intelligence, lack of alcohol or drug abuse, susceptibility to being directed or dominated by others. *Id.* With respect to the statutory mitigating factors set forth in R.C. §2929.04(B), the Ohio Supreme Court found that petitioner's youth was entitled to "some, but not much weight;" and that petitioner's lack of a significant criminal history was entitled to "somewhat greater weight." *Id.* That court also considered the fact that petitioner turned himself in, pleaded guilty, and expressed remorse, but ultimately gave that cooperation little weight because it came only after one of petitioner's companions had identified petitioner as a participant and only after petitioner had changed his own story several times. *Id.* That the Ohio Supreme Court independently concluded that that single, statutory aggravating circumstance outweighed the mitigating factors bolsters this Court's finding that the trial court did not err in its weighing the aggravating circumstance against the mitigating factors, and that, even if it did, petitioner was not

prejudiced by that weighing. Thus, the Court concludes that petitioner's sixth claim for relief is without merit.

Seventh Claim for Relief

In his seventh claim for relief, petitioner asserts that the trial court improperly denied his motion to vacate his sentence or, in the alternative, to withdraw his guilty plea based on new evidence. The new evidence offered by petitioner, which evidence had not been previously available to him, was testimony presented by the state during Clyde Daniel Wesley's subsequent trial claiming that it was Wesley, and not petitioner, who had shot and killed Mary Jane Stout. According to Wesley's cellmate, Wesley had confessed to him that, after petitioner shot Mr. Stout with the chrome .25 caliber pistol, petitioner dropped that pistol and ran. Wesley then picked up the pistol and shot Mrs. Stout. Petitioner argues that the new evidence, *i.e.*, the testimony of Wesley's cellmate implicating Wesley as the actual shooter, entitled petitioner to withdraw his guilty plea or, in the alternative, to have a new sentencing hearing. By far the most troubling of petitioner's claims, this assertion, along with a recent decision by the Court of Appeals for the Eighth Circuit, prompted the Court to order the parties to submit supplemental briefs.

In *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), *cert. denied, Gammon v. Smith*, -- S.Ct. --, 2000 WL 1337423 (Nov. 6, 2000), the Eighth Circuit granted a writ of habeas corpus because the state had violated the petitioner's due process rights when it presented factually inconsistent and irreconcilable evidence during different trials to obtain the convictions of two different defendants for the same murders. During the petitioner's trial, the prosecution relied on one of a co-defendant's two inconsistent versions of the events to obtain petitioner's conviction for the murders, and then relied on the other version at a subsequent trial to

convict someone else of the same murders. Pointing to the prosecution's use of "diametrically opposed testimony" during different trials to obtain convictions of different defendants for the same murders, as well as the fact that the petitioner could not have been convicted of felony murder under both theories, the Eighth Circuit found that the prosecution's actions rose to the level of a due process violation.

After the decision in *Smith v. Groose*, this Court directed the parties to file supplemental briefs addressing whether, or to what extent, the Eighth Circuit's decision might apply to petitioner's case. Petitioner argued that his conviction violates his rights under the Due Process Clause and must be set aside because the prosecution secured convictions against him and subsequently against Clyde Daniel Wesley by arguing that each had been the actual shooter. Respondent asserted that *Smith v. Groose* does not apply to petitioner's case since petitioner could have been convicted and sentenced to death even under the arguments and evidence that were presented during Wesley's subsequent trial, as an aider and abettor; neither the aggravated murder count nor the capital specification to which petitioner pleaded guilty required that he be the principal offender. The Court is constrained to agree.

The factually inconsistent and irreconcilable evidence at issue concerns who was the actual shooter, *i.e.*, petitioner or Clyde Daniel Wesley. During petitioner's culpability and penalty hearings, the state argued that petitioner shot and killed Mary Jane Stout. Later, during Wesley's trial, the state argued and presented testimony that Wesley shot and killed Mary Jane Stout. The critical difference between this case and *Smith* is that here, it was not necessary for the state to argue or prove beyond a reasonable doubt, nor was it necessary for the trial court to find, that petitioner was the actual shooter, *i.e.*, "principal offender." That is, petitioner

could have been convicted and sentenced to death as charged under the arguments and testimony presented during Wesley's trial.

Neither the aggravated murder count, nor the capital specification to which petitioner pleaded guilty, included as an element that petitioner was the actual shooter or "principal offender." Petitioner's indictment did not include a complicity, *i.e.*, aiding and abetting, count. Indeed, all indications from petitioner's indictment were that the state would proceed against petitioner as the actual shooter. Thus, petitioner's indictment was silent as to whether the state would proceed against him as the principal offender or as an aider and abettor. Under Ohio's aiding and abetting statute, however, it is not necessary for a defendant be charged as an aider and abettor to be convicted under aider and abettor liability; that a defendant is charged with a criminal offense is considered sufficient to place him on notice that the state could seek to convict him as either the principal offender or and aider and abettor. Subsection (F) of Ohio's aiding and abetting statute provides in relevant part that a charge of complicity may be stated in terms of that section or in terms of the principal offense. R.C. §2932.03(F). Ohio courts have construed R.C. §2923.03(F) to mean that a complicity conviction will be sustained under an indictment solely employing terms of the principal offense without an amendment to the indictment. *State v. Ensman*, 77 Ohio St. 3d 701, paragraphs one, two, and six of the syllabus (1991); *see also State v. Dotson*, 35 Ohio App. 3d 135 (Ohio App. 3 Dist. 1987)(holding that complicity statute allows defendant to be indicted either as the principal offender or as aider and abettor because statute gives sufficient notice that state could proceed against defendant under either theory).

Citing *State v. Taylor*, 66 Ohio St. 3d 295 (1993), petitioner asserted that, under Ohio law, a defendant convicted of aggravated murder and a capital specification

under aiding and abetting liability is not eligible for the death penalty. His assertion is not entirely accurate and his reliance on *Taylor* is misplaced. In *Taylor,* the defendant argued that the evidence was insufficient to establish the R.C. §2929.04(A)(7) death penalty specification attached to each aggravated murder count of which he had been convicted under aiding and abetting liability. The death penalty specification set forth in R.C. §2929.04(A)(7) requires proof either that the defendant was the principal offender or, if the defendant was not the principal offender, that the aggravated murder was committed with prior calculation and design. The defendant in *Taylor* argued that there was no proof either that he was the principal offender or that the aggravated murder was committed with prior calculation and design. The Supreme Court of Ohio agreed. With respect to the "principal offender" element, the court held that, while a defendant can be convicted of aggravated murder without being the actual killer, but by aiding and abetting the actual killer, such a finding cannot be "bootstrapped" into a finding that the defendant was the principal offender for purposes of making him eligible for the death penalty under R.C. §2929.04(A)(7).

Petitioner's reliance on *Taylor* is therefore misplaced, since neither the aggravated murder count, nor the death penalty specification, to which petitioner pleaded guilty required as an element proof that petitioner was the "principal offender." That is, even assuming that petitioner was convicted of the aggravated murder of Mary Jane Stout, not because he was the actual shooter, but because he aided and abetted the actual shooter, such a finding was not "bootstrapped" into a finding of any of the essential elements of the death penalty specification to which he pleaded guilty, *i.e.*, that the offense was committed to avoid detection, apprehension, trial, or punishment for the other offenses of aggravated robbery and attempted aggravated murder.

The circumstances surrounding petitioner's

conviction, and that of Clyde Daniel Wesley, do not fall squarely within the holding of *Smith v. Groose*. Since petitioner could have been convicted and sentenced to death as charged, even under the arguments and evidence subsequently presented by the state during Clyde Daniel Wesley's trial, the Court is constrained to find that the state's actions of arguing during and petitioner's hearing that he was the actual shooter, and then at Wesley's trial that Wesley was the actual shooter, did not violate petitioner's rights under the Due Process Clause.

That said, the Court is still troubled by the possibility that the state secured petitioner's death sentence by arguing that petitioner was the actual shooter, and then prosecuted Clyde Daniel Wesley as the actual shooter. As noted above, although the state was not required to prove that petitioner was the actual shooter, and the trial court was not required to find that petitioner was the actual shooter, the fact remains that the state *did* argue that petitioner was actual shooter and the trial court ***did*** find that petitioner was the actual shooter. In fact, the trial court cited its finding that petitioner was the actual shooter as a reason, and a very substantial reason, why the aggravating circumstance outweighed the mitigating factors.

As troubling as this fact is, however, it does not warrant habeas corpus relief because the Supreme Court of Ohio appears to have cured any misplaced reliance on the petitioner's having been the actual shooter. The Supreme Court, which is required to weigh independently the aggravating circumstances against the mitigating factors, considered the testimony of Clyde Daniel Wesley's cellmate – testimony the petitioner complained was unavailable when the trial court made its sentencing decision -- and found that the testimony was insufficient to tip the scales against imposition of death. In its discussion of the existence and weight any of the mitigating factors set forth in R.C.

§2929.04(B), the Supreme Court stated, "we find that the testimony of a cellmate during Clyde Daniel Wesley's trial is of minimal credibility, especially in light of [Stumpf's] guilty plea and the substantial evidence to the contrary adduced during [Stumpf's] sentencing hearing." *Stumpf, supra,* 32 Ohio St. 3d at 106. Thus, even assuming that the state's argument and trial court's finding that petitioner was the principal offender provided a basis for the trial court's determination that the aggravating circumstance outweighed the mitigating factors, the Supreme Court of Ohio cured any potential flaw by independently determining that the aggravating circumstance outweighed the mitigating factors, even in light of the testimony by Wesley's cellmate.

For the foregoing reasons, the Court finds that petitioner's seventh claim for relief is without merit.

Eighth Claim for Relief

Petitioner asserts in his eighth claim for relief that his constitutional rights were violated when his post-sentence motion to vacate his sentence was decided by only two judges following the intervening death of one of the judges comprising his original three-judge panel. The crux of petitioner's argument is that, because R.C. §2945.06 requires the bench trial of a capital defendant to be conducted by a three-judge panel, "[c]onsideration of post-sentencing proceedings by less than the entire panel is not authorized and violates petitioner's right to due process***." (Petition, doc.no. 2, at ¶80). Upon careful review, this Court is not persuaded either that the alleged deviation in state law -- a deviation that is only arguable, at best -- resulted in arbitrary or capricious action sufficient to state a claim in federal habeas corpus.

First, it is far from certain that state law was violated, as alleged by petitioner. With respect to a capital defendant's

decision to waive his right to a jury trial, and proceed instead with a bench trial, R.C. §2945.06 provides in relevant part:

> ***If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges***. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly.***

The Supreme Court of Ohio summarily rejected petitioner's argument that the trial court erred in ruling on his post-sentencing motion to withdraw his guilty plea with only two of the original three judges.

> R.C. 2945.06 expressly provides that "[t]he judges or a majority of them may decide all questions of fact and law arising upon the trial***. Unanimity is mandated only when the panel finds a defendant guilty or not guilty. Whether appellant was entitled to withdraw his guilty plea or to a new sentencing hearing were questions of law, properly determined by a majority of the panel.

State v. Stumpf, 32 Ohio St. 3d 95, 105 (1987), exh.BB to return of writ. It is well settled that federal habeas courts do not sit to differ with or even revisit an interpretation by the

state's highest court of state law. *Gall v. Parker*, 213 F.3d 265, 304 (6th Cir. 2000); *Norris v. Schotten*, 146 F.3d 314, 328 (6th Cir.), *cert. denied*, 525 U.S. 935 (1998); *see also Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). In light of the foregoing, petitioner's assertion that state law was violated when his post-sentencing motion to withdraw his guilty plea was decided by only two of the three original judges comprising his panel is not overly persuasive.

In any event, the scope of this Court's inquiry is confined to whether a state law error resulted in arbitrary and capricious imposition of the death penalty. *Cf. Richmond v. Lewis*, 504 U.S. 40, 50 (1992). Within the confines of that inquiry, the Court is not persuaded that the trial court's action in ruling on petitioner's post-sentence motion to withdraw his plea with only two judges resulted in or contributed to arbitrary and capricious imposition of the death penalty. Ohio courts describe R.C. §2945.06's three-judge-panel scheme not as a fundamental or structural protection, departure from which automatically undermines the validity of capital conviction, but as a procedural protection to help guard against arbitrary and capricious infliction of the death penalty. *See, e.g., State v. Green*, 81 Ohio St. 3d 100 (1998); *State v. Swiger*, 125 Ohio App. 3d 456, 463 (Ohio App. 9 Dist. 1998); *see also Cooey v. Anderson*, 988 F.Supp. 1066, 1080-81 (N.D. Ohio 1997)(regarding administration of Ohio's three-judge-panel provisions as application of procedural rules in death cases and not as application of death penalty itself). Thus, alleged irregularities in the administration of Ohio's three-judge-panel provisions, short of an allegation that either the finding of guilt or the sentence was not unanimous, invoke a case-by-case analysis to determine whether the alleged irregularity prejudiced the defendant.

In the instant case, two of the original three judges considered and rejected petitioner's post-sentencing motion

to withdraw his guilty plea or for a new sentencing hearing. Under a strict reading of R.C. §2945.06, it does not appear that post-sentencing matters fall within the realm of decisions that require unanimity, *i.e.*, finding the defendant guilty or not guilty and determining that the aggravating circumstance or circumstances outweigh the mitigating factors. The court of appeals and Supreme Court of Ohio reviewed the circumstances surrounding petitioner's motion to withdraw his guilty plea, and found not only that the trial court committed no error in deciding the motion with only two judges, but also that there was no legal or evidentiary basis supporting petitioner's motion; in so holding, those courts forcefully rejected petitioner's argument that the life sentence imposed on his co-defendant, Clyde Daniel Wesley, following Wesley's subsequent trial, undermined or otherwise affected the validity of petitioner's guilty plea or death sentence. For these reasons, the Court is not persuaded either that there was a violation of state law or that, assuming there was, the error resulted in or contributed to arbitrary and capricious imposition of petitioner's death sentence. Petitioner's eighth claim for relief is without merit.

Ninth Claim for Relief

In his ninth claim for relief, petitioner asserts that the trial court did not comply with R.C. §2929.03(F). That section provides that when a three-judge panel imposes a sentence of death, the panel is required to state in a separate opinion specific findings relating to the existence of any mitigating factors, the aggravating circumstances, and the reasons why the aggravating circumstances were sufficient to outweigh the mitigating factors. Petitioner complains that trial court did not adequately identify aggravating and mitigating factors or assign them appropriate weight. The Court disagrees.

The trial court's sentencing opinion complied with

the letter and spirit of Ohio law. Section 2929.03(F) provides:

> The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors***.

The trial court's sentencing opinion explicitly set forth those mitigating factors set forth in R.C. §2929.04(B) that the trial court found to exist, to wit: youth of the offender and lack of significant criminal history; its conclusion that none of the nine other mitigating factors offered by petitioner had been established by a preponderance of the evidence; the aggravating circumstance that petitioner was found guilty of committing, to wit: the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for other offenses committed by the defendant, aggravated robbery and attempted aggravated murder; and the reasons why the aggravating circumstance was sufficient to outweigh the mitigating factors. (Opinion, 09/24/84, exh.D to return of writ). The Supreme Court of Ohio, after reviewing the trial court's sentencing opinion, conclusively found that, "the three-judge panel thereby discharged its duties under RC. 2929.03(F)." *Stumpf*, 32 Ohio St. 3d at 102-103. Short of merely disagreeing with the trial court's decision, petitioner has not identified the manner in which the trial court's sentencing opinion fails to comply with R.C. §2929.03(F). That being so, the Court finds that petitioner's

ninth claim for relief is without merit

Conclusion

In an earlier Opinion and Order, this Court found that claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, 3, and 5.a were barred by procedural default. For the foregoing reasons, the Court finds that petitioner's remaining claims are without merit. Accordingly, all of petitioner's claims are DENIED and this action is hereby DISMISSED. Petitioner is DIRECTED to file with this Court, in accordance with his supplemental brief filed on October 2, 2000, (doc.no. 24, at 2 n.2), and within thirty days from the date of this order, the transcript from Clyde Daniel Wesley's trial. To the extent that petitioner has moved to file a supplemental brief on the merits of petitioner's claims, (doc.no. 24, at 1 fn.1), that motion is DENIED as moot.

/s/GEORGE C. SMITH
United States District Judge

Date: 2\6\01

[Excerpt from Stumpf's Sixth Circuit Brief]

* * *

had either (a) consulted with and called a psychologist or (b) called the jail guards to testify. Obviously, the probability that the result would have been different is even greater when that evidence, plus the evidence that would have been introduced from the seventeen additional witnesses, are considered in their totality. Clearly, Petitioner was deprived of effective assistance of counsel at sentencing.

III. The District Court Erred In Denying Petitioner's Claim That His Guilty Plea Was Not Voluntary And Knowing And Therefore Was Obtained In Violation Of His Due Process Rights Under The Fourteenth Amendment

In *Boykin v. Alabama*, 395 U.S. 238 (1969), the Supreme Court noted that "[a] plea of guilty... is itself a conviction; nothing remains but to give judgment and determine punishment." *Id.* at 342. When a defendant pleads guilty he simultaneously waives a number of constitutional rights including the right against self-incrimination, the right to trial by jury, and the right to confront one's accusers. *See, Brady v. United States,* 397 U.S. 742, 748-749 (1970). As a result, the Due Process Clause of the Fourteenth Amendment requires that a plea of guilty be voluntary and intelligent in order for it to be constitutionally valid. *Id.* In general, a plea is considered voluntary when the defendant is fully aware of the direct consequences and the plea is not induced by threats or misrepresentations. *Id.* at 755. A plea is considered intelligent "when the criminal defendant enters it after receiving real notice of the true nature of the charge against him." *Brown v .Cockrell,* 2001 U.S. Dist. LEXIS 18933, at *10 (Tx.N.D.Ct., Nov. 16, 2001) *(quoting Bousley v. United States,* 523 U.S. 614, 618 (1998)).Whether a plea is both voluntary and intelligent is determined by looking at the

totality of the circumstances. *See, Brady,* 397 U.S. at 749; *Garcia v. Johnson,* 991 F.2d 324, 327 (6th Cir. 1993).

When the validity of a guilty plea is challenged in a habeas corpus proceeding, a court will uphold the plea only if it is knowing, voluntary, and intelligent. *See, James v. Cain,* 56 F.3d 662, 666 (5th Cir. 1995). In general, "[i]f a defendant understands the charges against him, understands the consequences of a guilty plea, and voluntarily chooses to plead guilty, without being coerced to do so, the guilty plea ...will be upheld on federal review." *Frank v. Blackburn,* 646 F.2d 873, 882 (5th Cir. 1980). To assess these elements, the reviewing court will look at the trial record. *Garcia,* 991 F.2d at 326.

Petitioner asserts that his guilty plea was not voluntary and intelligent and therefore was not valid. Specifically, Petitioner asserts that the fact that he received no benefit from pleading guilty to a capital murder charge, that he has consistently maintained his innocence, and that he did not know he would still be death eligible, demonstrate that his plea was neither voluntary nor intelligent. The District Court held that the trial record surrounding Petitioner's guilty plea "suggest both an air of regularity and that petitioner's plea was voluntary, intelligent, and knowing." (R 27 Opinion and order at 25, J.A. 1502). While Petitioner acknowledges that the record suggests an air of regularity and a valid plea, Petitioner asserts that the District Court erred in failing to view the record in light of Petitioner's steadfast insistence that he did not fire the shots that killed the decedent. This fact demonstrates that Petitioner did not have "a full understanding of what the plea connotes and of its consequences" as mandated by the Supreme Court in *Boykin*, 395 U.S. at 244.

In *Cupe v. Warden,* 2000 Conn. Super. LEXIS 2714 (Sup. Ct. CT., Oct. 12, 2000), the court found that the petitioner's guilty plea was not knowing, intelligent or

voluntary when his trial counsel failed to inform him that by pleading guilty he was giving up his right to appeal a motion to suppress evidence. In reaching this decision, the court noted that "[e]ven during the sentencing hearing the petitioner still claimed he wanted to appeal the denial of the Motion to Suppress." *Id.* at *11. The court then stated, "[it] is clear that he gave up a right unknowingly, and therefore, his plea was not made in a knowing, intelligent, and voluntary manner." *Id.* Similarly, in this case, Petitioner has steadfastly maintained that he did not fire the deadly shots, indicating that he did not have "a full understanding of what the plea connotes and its consequences." *Boykin*, 395 U.S. at 244.

In addition, Petitioner pled to an indictment that made him death eligible which indicates that he was not fully aware of the direct consequences of his guilty plea as required under the Due Process Clause. *Brady,* 397 U.S. at 755. Furthermore, Petitioner's insistence that his lawyer tell the court he expected to be given an opportunity to present evidence relevant to his conduct, lends further evidence to the fact that Petitioner did not understand the consequences of his guilty plea. (Guilty Plea Hearing at TR 18, J.A. 1652). Finally, the District Court noted that "the prosecuting attorney's explanation of the plea arrangements was somewhat difficult to follow, and that criminal defendants in such situations will often answer questions posed by the trial court without a clear understanding of each and every term uttered -- especially if advised by counsel to do just that." (R 27 Opinion & order at 27, J.A. 1504). This factor is especially important in Petitioner's case given that Petitioner has an IQ of 80, placing him in the borderline mental retardation range. (R 13 Return of Writ, Exhibit LL to the Return of Writ, Amended Petition to Vacate at exhibit B, J.A. 994-1003; Blume & Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis,* 41 Ark. L. Rev. 725, 731(1988) (citing the Diagnostic and Statistical Manual of Mental Disorders). Again, whether a plea is

voluntary and intelligent must be determined in light of the totality of circumstances. *See, Brady,* 397 U.S. at 749; *Garcia v. Johnson,* 991 F.2d 324, 327 (6th Cir. 1993)

The testimony of individuals involved in the trial supports Petitioner's claim that his plea was not knowing and intelligent. Debbie Starkey, a social worker who assisted Petitioner's trial attorneys in preparing mitigation for his case stated in her affidavit that:

> The attorneys did not spend time explaining things to [Petitioner]. They would just tell him what to do. [Petitioner] didn't understand a lot of what was happening. [Petitioner] testified to what his attorneys told him to testify.
>
> It would not surprise me at all that [Petitioner] did not understand to what he pled guilty to.

(R 13 Return of Writ, Exhibit LL to Return of Writ, Amended Petition to Vacate at exhibit D at Paragraphs 19-20, J.A. 1013). Charlotte Gilbert, another social worker that assisted in preparing mitigation for Petitioner's case stated in her affidavit at post-conviction:

> John did not want to enter a guilty plea.
>
> The attorneys, Mr. Tingle and Mr. Stephens, would tell John what to do. John would go along with whatever the attorneys told him.

(R 13 Return of Writ, Exhibit LL to Return of Writ, Amended Petition to Vacate at exhibit E at Paragraphs 17-18, J.A. 1019). This testimony taken in conjunction with Petitioner's steadfast insistence that he was not the shooter and the fact that he pled guilty to an indictment that made him death eligible, demonstrate that his plea was neither

knowing nor intelligent.

The District Court held that Petitioner knew he was still death eligible because on the record, the trial judge apprised him of that fact. (R 27 Opinion & order at 26, J.A. 1019). While Petitioner acknowledges this, Petitioner again asserts that this excerpt from the record must be evaluated in light of other factors including his continual claim that he did not fire the shots and the fact that he received no benefit from pleading guilty to a capital offense. These factors show that although the trial judge apprised Petitioner that he was death eligible, Petitioner did not understand that death was a possible sentence. Petitioner's guilty plea cannot be knowing and intelligent unless he "understand[s] the significance and consequences of [this] decision." *Godinez v. Moran,* 509 U.S. 389, 401 n.12 (1993). *See, also, Boykin v Alabama,* 395 U.S. 238, 244 (1969) (defendant pleading guilty must have a full understanding of what the plea connotes and of its consequences).

The District Court also held that Petitioner's no benefit argument also fails because it is based on the fact that he "ultimately did not obtain the results [he] desired." (R 27 Opinion & order at 26, J.A. 1019). However, the fact that Petitioner received no benefit from pleading guilty is relevant not because in hindsight this appears to be true but because the lack of benefit demonstrates that Petitioner did not understand the consequences of pleading guilty-- specifically, the fact that he could still be sentenced to death. If he had, there would have been no incentive for Petitioner to plead guilty.

Petitioner also asserts that his guilty plea is invalid because trial counsel failed to advise him that he would receive no benefit from the plea bargain and that he would still be death eligible. When the ineffective assistance of counsel results in the defendant deciding to plead guilty, the

defendant has suffered a constitutional violation and the validity of his guilty plea is subject to attack. *See, Hill v. Lockhart,* 474 U.S. 52 (1985). In *Hill v. Lockhart,* the Supreme Court stated that the two-part standard announced in *Strickland v. Washington,* 466 U.S. 668 (1984), for determining what constitutes ineffective assistance of counsel, applies to challenges to guilty pleas as well. *Id.* at 57-59. Therefore, in order for Petitioner to succeed on this claim, he must demonstrate (1) that trial counsel's performance fell below reasonable professional norms and (2) that there is a reasonable probability that but for trial counsel's deficient performance, he would not have pled guilty to the capital offense. *See, Strickland,* 466 U.S. at 687-688; *Hill v. Lockhart,* 474 U.S. at 58-59.

As to the deficient performance prong, Petitioner asserts that trial counsel was deficient for failing to inform him that he would still be death eligible after pleading guilty. Petitioner's mother, Loretta Procacina, stated in her affidavit at post-conviction that "Mr. Tingle told us that John would not get the death penalty because he pled guilty" and that "[she] was shocked when [Petitioner] got the death penalty because Mr. Tingle said he would not get it." (R 13 Return of Writ, Exhibit LL to the Return of Writ, Amended Petition to Vacate at exhibit CC at Paragraphs 9 and 12, J.A. 895). Similarly, Petitioner's oldest sister, Vicki Stumpf Haley, testified at post-conviction that "[b]ased on what Mr. Tingle told us, I believe that because John pled guilty he would not get the death sentence." (R 13 Return of Writ, Exhibit LL to the Return of Writ, Amended Petition to Vacate at exhibit DD at Paragraph 6, J.A. 898). In addition, as mentioned earlier, Debbie Starkey, a social worker who assisted Petitioner's trial attorneys in preparing mitigation for his case stated in her affidavit at post-conviction that:

> The attorneys did not spend time explaining things to [Petitioner]. They would just tell him what to do. [Petitioner] didn't understand a lot of what was happening. [Petitioner] testified to what his attorneys told him to testify.
>
> It would not surprise me at all that [Petitioner] did not understand to what he pled guilty.

(R 13 Return of Writ, Exhibit LL to the Return of Writ, Amended Petition to Vacate at exhibit D at Paragraphs 19 and 20, J.A. 1013). These statements demonstrate that Petitioner was not aware that he would still be death eligible after pleading guilty.

In the guilty plea context, reasonable professional norms dictate that "an attorney insure that his client understood his rights, the nature of the charges and the possible sentence if convicted." *Houston v. Lack,* 625 F.Supp. 786, 790 (D.Ct.W.Dt.Tenn. 1986) (quoting *Jones v. Parke,* 734 F.2d 1142, 1146 (6th Cir. 1984). Furthermore, a guilty plea must be an intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences" and trial counsel's function is to ensure that this awareness exists. *Brady,* 397 U.S. at 748. Because trial counsel failed to inform Petitioner that he would still be death eligible, Petitioner was not aware of the possible sentence and the consequences of his plea. This constituted deficient performance and renders his guilty plea invalid. In *Hill v. Lockhart,* 474 U.S. 52 (1985), the Court stated that the voluntariness of a plea depends on "whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 56. Clearly, trial counsel's failure to inform Petitioner that death was a possible sentence if he pled guilty, was outside this "range of competence."

In *Sparks v. Sowders,* 852 F.2d 882 (6th Cir. 1988), this Court granted relief to the defendant on the grounds that his guilty plea was invalid due to counsel's erroneous advise

concerning parole eligibility. In *Sparks*, counsel had informed the defendant that if convicted he could receive life without parole. As a result, defendant decided to plead guilty. In actuality, no such sentence existed in Kentucky at that time. This Court held that this type of misinformation constituted ineffective assistance of counsel. *Id.* at 885. The situation here is remarkably similar. The only difference is that while here, counsel misinformed the Petitioner by telling him the punishment was less severe than it actually was, in *Sparks*, the counsel misinformed the defendant by telling him the punishment was more severe than it actually was. Both cases involve situations where trial counsel misinformed the defendant about the consequences of pleading guilty. Petitioner asserts that a guilty plea is only voluntary "[i]f a defendant understands the charges against him, understands the consequences of a guilty plea, and voluntarily chooses to plead guilty." *Frank v. Blackburn*, 646 F.2d 873, 882 (5th Cir. 1980).

Furthermore, Petitioner can clearly demonstrate that he would not have pled guilty if his counsel had informed him that he would still be death eligible. This is evidenced by the fact that Petitioner received no benefit from pleading guilty. There was no reason to plead guilty to a indictment that made him death eligible. Furthermore, this prejudice was not cured by the trial court's instruction during the guilty plea proceeding. As argued above, despite the seeming regularity of the proceeding, Petitioner did not make a voluntary and intelligent plea, as evidenced by his steadfast insistence that he did not fire the deadly shots.

In conclusion, Petitioner submits that the totality of the circumstances indicate that his guilty plea was not voluntary or intelligent because he received no benefit from pleading guilty to a capital murder charge, he has consistently maintained his innocence, and he did not know he would still be death eligible due to his trial counsel's ineffective

assistance. Petitioner requests that this Court vacate Petitioner's guilty plea and sentence of death, and remand this case for a new trial.

IV. The District Court Erred in Rejecting Petitioner's Claims That the Ohio Death Penalty Statute is Unconstitutional

The Eighth Amendment to the United States Constitution and Article I, §9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment protections are applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). The Ohio death penalty scheme offends this bedrock principle in the following ways.

A. The "Felony Murder" Aggravating Circumstance in O.R.C. § 2929.04(A)(7) Is Constitutionally Invalid When Used To Aggravate O.R.C. § 2903.01(B) Aggravated Murder

"[T]o avoid [the] constitutional flaw of [vagueness and over breadth under the Eighth Amendment], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of a defendant as compared to others found guilty of [aggravated] murder." *Zant v. Stephens*, 462 U.S. 862 (1983). Ohio's statutory

* * *

INDICTMENT

THE STATE OF OHIO,
COURT OF COMMON PLEAS

Guernsey County, ss:

Of the Term of May in the year of our Lord,
one thousand nine hundred and eighty--four (1984).

COUNT ONE:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA on or about the 14th day of May, 1984 at the County of Guernsey aforesaid,

did purposely cause the death of another person, to wit: Mary Jane Stout, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, the offense of "Aggravated Robbery", in violation of Ohio Revised Code, Section 2903.01(B), entitled "AGGRAVATED MURDER", and contrary to the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION ONE TO THE FIRST COUNT:

The Grand Jurors further find and specify, under Ohio Revised Code, Section 2929.04(A) (3), in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense was committed for the purpose of escaping detection, apprehension, trial or punishment for other offenses committed by the above-named John David Stumpf, to wit: "AGGRAVATED ROBBERY" [& ATTEMPTED

AGGRAVATED MURDER (by interlineation).]

SPECIFICATION TWO TO THE FIRST COUNT:

The Grand Jurors further find and specify under Ohio Revised Code, Section 2929.04(A)(5) and in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, to wit: Mary Jane Stout and Norman Stout.

SPECIFICATION THREE TO THE FIRST COUNT:

The Grand Jurors further find and specify under Ohio Revised Code, Section 2929.04 (A) (7), and in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense was committed while the above-named John David Stumpf was committing, or attempting to commit, or fleeing immediately after committing or attempting to commit the offense of "AGGRAVATED ROBBERY", and further that the above-named John David Stumpf was the principal offender in the commission of the offense of "AGGRAVATED MURDER" as charged in the First Count.

SPECIFICATION FOUR TO THE FIRST COUNT:

The Grand Jurors further find and specify, under and in compliance with Ohio Revised Code, Section 2941.141, that the above-named John David Stumpf had a firearm on or about his person or under his control while committing the aforesaid offense.

COUNT TWO:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did purposely engage in conduct, which, if successful, would have constituted the offense of "Aggravated Murder", by then and there purposely attempting to cause the death of another person, to wit: Norman B. Stout, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit the offense of "Aggravated Robbery", all being in violation of Ohio Revised Code, Section 2923.02(A), entitled "ATTEMPTED AGGRAVATED MURDER" (Felony in the First Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO THE SECOND COUNT:

The Grand Jurors further find and specify, under and in compliance with Ohio Revised Code, Section 2941.141, that the above-named John David Stumpf had a firearm on or about his person or under his control while committing the aforesaid offense.

COUNT THREE:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, in attempting or committing a theft offense as defined in Ohio Revised Code,

Section 2913.01, to wit: the offense of "Grand Theft" of property of one Norman B. Stout and one Mary Jane Stout, or in fleeing immediately after such attempt or offense, did then and there have a deadly weapon, to wit: a firearm, on or about his person or under his control, in violation of Ohio Revised Code, Section 2911.01, entitled "AGGRAVATED ROBBERY" (Aggravated Felony in the First Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO THE THIRD COUNT:

The Grand Jurors further find and specify, under and in compliance with Ohio Revised Code, Section 2941.141, that the above-named John David Stumpf had a firearm on or about his person or under his control while committing the aforesaid offense.

COUNT FOUR:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did with purpose to deprive the owner thereof, Mary Jane Stout, knowingly obtain or exert control over a certain motor vehicle, to wit: a 1976 Plymouth Sedan, Serial No. RH41G6A160499, by threat, in violation of Ohio Revised Code, Section 2913.02, entitled "GRAND THEFT—MOTOR VEHICLES" (Felony in the Third Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

COUNT FIVE:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did with purpose to deprive the owner thereof, Norman B. Stout, knowingly obtain or exert control over a certain firearm, to wit: a .357 caliber Smith and Wesson, Model 28-2, Serial Number N552178 hand gun, by threat, in violation of Ohio Revised Code, Section 2913.02, entitled "GRAND THEFT—FIREARM" (Felony in the Fourth Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/J. R. Scott
Prosecuting Attorney

IN THE COURT OF COMMON PLEAS,
GUERNSEY COUNTY, OHIO

STATE OF OHIO,
Plaintiff, Case No. 9684

vs.

JOHN DAVID STUMPF, STATE'S RESPONSE TO MOTION TO WITHDRAW GUILTY PLEA

Defendant.

The defendant has moved the court for leave to withdraw his guilty plea or, in the alternative, for an order vacating the previously imposed sentence. The state opposes the motion in its entirety.

A plea of guilty is a complete admission of the defendant's guilt. By entering his guilty plea to the principal charge and to the specifications, the defendant admitted that *he* purposefully murdered Mary Jane Stout during the course of an aggravated robbery and that *he* did so for the express purpose of avoiding detection, apprehension, trial or punishment for his crime of attempting to murder Norman Stout during an aggravated robbery. In short, by pleading guilty, the defendant admitted that he killed Mary Jane Stout to make good his getaway. A guilty plea is the highest form of confession known in jurisprudence.

A motion to withdraw a guilty plea is addressed to the sound discretion of the trial court. Criminal Rule 32.1. That rule provides as follows:

> "A motion to withdraw a plea of guilty or not contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of

conviction and permit the defendant to withdraw his plea."

After sentence has been imposed, a defendant seeking to withdraw a guilty plea bears the burden of establishing manifest injustice under Criminal Rule 32.1. *State v. Smith* (1977), 49 Ohio St. 2d 261. Construing the virtually identical federal counterpart to Ohio Criminal Rule 32.1, the United States Court of Appeals for the third circuit has observed that:

> "[t]he withdrawal of a plea of guilty is not a matter of right. A motion for leave to withdraw a plea of guilty and substitute a plea of not guilty is addressed to the sound discretion of the court and should be denied if the defendant knew and understood what was being done and there were not present any circumstances of force, mistake, misapprehension, fear, inadvertence or ignorance of his rights and understanding of the consequences of his plea."
> *United States v. Ptomey* (3rd Cir., 1966), 366 F. 2d 759, 760.

Defendant herein makes no claim that his plea was not entered knowingly, intelligently and voluntarily and review of the record clearly demonstrates the plea was properly taken. Having confessed through his guilty plea in open court that he committed the offense, the defendant bears a heavy burden to demonstrate that manifest injustice will occur if his plea is not withdrawn. In point of fact, defendant has advanced absolutely no reason to permit withdrawal of his guilty plea.

> "Neither manifest injustice nor an abuse of discretion is shown merely because [a

> defendant] chose to test the water and found it too fervid."
> *United States v. Prince*, 533 F. 2d 205, 209 (5th Cir., 1976).

Defendant's motion to withdraw his guilty plea has no foundation in fact or law and should be overruled.

Defendant next urges that, based on testimony presented during the trial of his co-defendant, Clyde Wesley, the court should vacate the previously imposed sentence and conduct a new sentencing hearing. Again, the state opposes the defendant's motion.

It has long been recognized that where co-defendants are separately tried, identical results are not required. e.g. *State v. Goins* (1889), 46 Ohio St. 457.

> "One indicted as an aider and abettor of the crime of murder may be placed on trial, convicted and sentenced for that offense notwithstanding the principal offender had been tried previously, and convicted and sentenced for manslaughter only."
> *Ibid.*, syllabus paragraph three.

The criteria for imposing the death penalty in a capital offense are set forth in Section 2929.04 Revised Code. The requirement that the actor be either the principal or to have acted with prior calculation and design applies solely to the specification set forth in subparagraph seven. The defendant herein admitted his guilt to the specification set forth in subparagraph *three*; that he killed Mary Jane Stout to avoid detection, apprehension, trial or punishment for attempted aggravated murder (shooting Norman Stout in the head) and for aggravated robbery. That the death penalty is authorized for aiders and abettors is further exemplified in subparagraph

(B)(6), mitigation. Under that subparagraph, the sentencing authority may consider the offender's degree of participation in the offense in mitigation where the offender was not the principal offender. It is apparent that execution of an aider and abettor is authorized by R.C. § 2929.04. Therefore, while this court found from the evidence that defendant Stumpf actually shot Mary Jane Stout, that finding was not a condition precedent to imposing the death penalty.

Defendant Stumpf urges that testimony of James Eastman to the effect that Clyde Wesley admitted shooting Mary Jane Stout, entitles Stumpf to vacation of his sentence and a new sentencing hearing. We respectfully disagree. At Stumpf's hearing it was clear that he was the person who carried the chrome .25 caliber Raven pistol used to kill Mrs. Stout. Norman Edmonds testified he gave the gun to Stumpf in the car; Norman Stout was positive that Stumpf held the chrome pistol and that Stumpf shot him with the chrome pistol. Regaining consciousness after being twice shot in the head by Stumpf, Mr. Stout heard the two defendants in a discussion after which he heard the four additional shots which killed his wife, Mary Jane. The bullet from the top of Norman Stout's head was fired from the same gun which killed Mrs. Stout. The partial slug taken from between Mr. Stout's eyes had the same characteristics. The court is not required to accept Eastman's statement that Wesley admitted being the one who actually fired the gun which killed Mrs. Stout. Even so, as noted above, that finding is unnecessary to imposition of the death penalty.

Moreover, the three judge panel which made up the court in this case remains available to determine whether the death penalty would have been imposed even if defendant Stumpf were found not to have actually pulled the trigger of the gun which killed Mrs. Stout. The Ohio Supreme Court used this procedure in remanding a capital case to the original three judge panel with instructions to adhere to the

original judgment or enter such new judgment as was warranted by the evidence. See *State v. Staten* (1969), 18 Ohio St. 2d 13, 22 and *State v. Staten* (1971), 25 Ohio St. 2d 107, 108. This court is in the same position as the original triers of fact in *Staten*. If James Eastman's testimony, even if believed, would not alter the judgment of sentence, then no further hearing is required and the three judge panel may so state in a supplement to the original findings required by Section 2929.03 Ohio Revised Code. Only if the court determines that Eastman's testimony might warrant a different sentence, would a further hearing to take Eastman's testimony be necessary. Even deleting the finding that Stumpf was the principal offender and actually shot Mrs. Stout, the remaining findings of the court amply support the determination that the aggravating circumstances outweigh the mitigating factors.

CONCLUSION

The defendant has advanced no judicially cognizable basis for allowing him to withdraw his guilty plea. That portion of his motion should be overruled. The three judge panel being available, the court can determine whether the death penalty would still be imposed even assuming, *arguendo*, that defendant Stumpf did not actually fire the pistol which killed Mrs. Stout. If such is the case, the court may so state. Only if the court determines the need to hear Eastman's testimony would a further hearing be necessary.

The state urges the first course of action. Even deleting the finding that Stumpf was the principal offender, the remaining aggravating circumstances still outweigh any mitigating factors.

Respectfully submitted,

C. KEITH PLUMMER
Prosecuting Attorney

/s/ James R. Scott
James R. Scott
Special Assistant Prosecuting Attorney
Counsel for the State of Ohio

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed this 15th day of July 1985, to Lewis M. Tingle, 138 North Seventh Street, Cambridge, Ohio 43725, Counsel for the Defendant, by U.S. Mail, postage prepaid.

/s/ James R. Scott
James R. Scott

IN THE COURT OF COMMON PLEAS
IN AND FOR THE FIFTH DISTRICT
COURT OF APPEALS, GUERNSEY
COUNTY, OHIO

CASE NO. 9684

STATE OF OHIO

APPELLEE,

vs.

JOHN DAVID STUMPF

APPELLANT.

Transcript of the Proceedings held on September 17, 18, 19, 20, 21 and 24, 1984 before the Honorable Judges John E. Henderson, J. Warren Bettis and Raymond Rice.

APPEARANCES:

JAMES R. SCOTT
C. KEITH PLUMMER
Prosecuting Attorneys
139 W. 8th St.
Cambridge, OH

For the Appellee,

LEWIS M. TINGLE
CRAIG M. STEPHENS
Attorneys at Law
138 N. 7th St.
Cambridge, OH

For the Appellant.

FILED COMMON PLEAS COURT
1984 DEC-3 AM 8:47
[illegible]
CLERK OF COURTS
GUERNSEY COUNTY

[3.] PROCEEDINGS

(Whereupon, on September 17, 1984, at 1:49 o'clock p.m., the following proceedings were had before the Court.)

JUDGE HENDERSON: Before I begin with the matter at hand, I would like to introduce those who are with me at the bench. I did hear the Bailiff very plainly recite our names, but possibly there might be some doubt as to which one's which.

I am John E. Henderson of Guernsey County and I have been selected to preside in this case. And seated on my right is Judge Warren Bettis of Columbiana County, who has been assigned here by the Supreme Court as one of the three Judge Court. And to my left is Judge Rice--Judge Raymond Rice of Tuscarawas County, retired Judge. He is also a part of the three Judge panel.

The case that is before us at this time is the case of The State of Ohio versus John David Stumpf. The case bears a number, Case Number 9684.

At this time I note present in court at the counsel table the Prosecuting Attorney of Guernsey County, Mr. James Scott and the Assistant Prosecuting Attorney, Keith Plummer. They represent the State of Ohio in this case. And at the rear counsel table representing the defendant [4.] is Attorney Craig Stephens of Ravenna and Attorney Lewis

Tingle of Cambridge, Ohio, and the defendant is present at the counsel table.

This is a case that has been brought to the attention of this Court by reason of an Indictment. An Indictment which was filed in this Court in the May term of 1984 and it consists of five counts and to the first count, which is that of Aggravated Murder, are specifications, first, second, third and fourth specifications. Count two is a count alleging Attempted Aggravated Murder and there is a specification to the second count. Count three is a count alleging Aggravated Robbery with a specification thereto and Count four is a specification of Grand Theft Motor Vehicle and Count five is a count alleging Grand Theft of a firearm. Those are the matters which are at the present time before this Court.

By way of explanation, this case was assigned for a jury trial and at the request and at the instance of the defendant with the advice and consent of his attorneys, the defendant did on the 23rd day of August, 1984, file with this Court a waiver as follows: I, John David Stumpf, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by duty and elect to be tried by a three judge panel in the Court to which the case may be pending. I fully understand that under the laws [5.] of this State I have a Constitutional right to a trial by jury.

Gentlemen of Counsel for the defense, I would ask at this time is the entire case and all counts before the Court for consideration at this time?

MR. TINGLE: Yes, Your Honor, it is.

JUDGE HENDERSON: Thank you. I have been advised that the State of Ohio has a motion at this time which it wishes to present. Mr. Scott?

MR. SCOTT: If it please the Court, as the Court is aware, we have been conferring with defense counsel for some time this morning or earlier today prior to these proceedings. I believe we have arrived at a negotiated plea situation and I wish to recite for the record the understanding that I have, subject to the concurrence and agreement of defense counsel as to the matters agreed upon, with the Court's permission.

JUDGE HENDERSON: You may proceed.

MR. SCOTT: Your Honor, the first matter that would be dealt with or the State would ask leave of Court pursuant to Criminal Rule 7 (D) and Ohio Revised Code Section 2941.30 to amend by interlineation specification one to the first count of the Indictment in order that it may read as follows: The Grand Jurors further find and specify under Ohio Revised Code Section 2929.04 (A) (3) in [6.] compliance with Ohio Revised Code Section 2941.14 that the aforesaid offense being the offense charged in the first count, the Aggravated Murder, was comitted for the purpose of escaping detection, apprehension, trial or punishment for other offenses--the words, "other offenses" are the first change, committed by the above named John David Stumpf, to wit: Aggravated Robbery and then we're adding the language "and Attempted Aggravated Murder". If that amendment is granted, the defendant then would enter a plea of guilty to the first count contained in the Indictment, being the Aggravated Murder count and a plea of guilty to specification one to the first count as amended; would also enter a plea of guilty to the second count in the Indictment, being the offense of--excuse me, back up. As to the first count he would also enter a plea of guilty to specification four to the first count. So, he will be pleading to the first count, the amended specification one to the first count and specification four to the first count. With regard to the second count, being the Attempted Aggravated Murder, he would

enter a plea of guilty to the Attempted Aggravated Murder and a plea of guilty to the specification to the second count. If the pleas of guilty to the two counts and the specifications I've mentioned are accepted by the Court, the Court would then proceed under Criminal Rule 11 (C) (3) to determine if there is a [7.] factual basis for the plea of guilty to the Aggravated Murder charge and the existence of the aggravating circumstances and if the pleas are accepted the State would then ask leave to enter a nolle pros as to specifications two and three to the first count and also a nolle pros as to the third, fourth and fifth counts in the Indictment and including the specification to the third count.

That is my understanding of the arrangement that we are proposing to the Court at the present time.

JUDGE HENDERSON: Thank you, Mr. Scott. Before ruling on the motion or amendment of the Indictment, I would ask Counsel for the defense if they wish to comment upon the statement of the Prosecutor. Mr. Tingle?

MR. TINGLE: If the Court please, the statement made by the Prosecuting Attorney is an accurate statement based upon our discussions with him earlier today and one upon which we are ready to proceed at this time.

JUDGE HENDERSON: I'm going to ask the Counsel for the defendant to inform the defendant that I am going to ask one question of the defendant very shortly and that question is this: Do you, John David Stumpf, affirmatively acknowledge the agreement that has been stated by the Prosecutor and concurred in by the defendant's counsel? Having forewarned the defendant of the question that is to [8.] be asked, I'm going to ask that question now. Mr. Stumpf, do you affirmatively acknowledge this agreement?

MR. STEPHENS: Would you repeat the question for him, Your Honor?

JUDGE HENDERSON: Mr. Stumpf, do you affirmatively acknowledge the agreement that has been stated by the Prosecutor and concurred in by your attorneys?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Very well, you may be seated. Motion has been made by the Prosecutor---

MR. TINGLE: If the Court please, if I might interrupt. One matter that was not set forth in the statement of the Prosecuting Attorney, which I believe needs to be a matter of record at this time, the two specifications known as the gun specifications to count one, being specification number four and count two, the gun specification, I believe were to be stated by the Prosecuting Attorney to be the result of one transaction as part of our negotiations also.

JUDGE HENDERSON: Mr. Scott?

MR. SCOTT: That is correct, Your Honor, within the meaning of Section 2929.71 the fourth specification or gun specification to the first count and the gun specification being the only specification to the second count are to be treated as part of the same because both offenses [9.] were committed as part of the same transaction within the meaning of 2929.71 of the Code.

JUDGE HENDERSON: Mr. Tingle, are you satisfied then?

MR. TINGLE: Yes, Your Honor.

JUDGE HENDERSON: I'm going to once again in the interest of caution, ask the defendant now that there has been a clarification of the agreement, I'm going to ask the defendant again, Mr. Stumpf, do you affirmatively acknowledge this agreement between the Prosecuting Attorney and your attorneys?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: There has been a motion made to amend the Indictment, specifically specification one to the first count by changing the word "another" to "other", the word "offense" to "offenses" and by adding at the end thereof of that specification to the first count the words "and Attempted Aggravated Murder". Do I state your amendments correctly, sir?

MR. SCOTT: Yes, Your Honor.

JUDGE HENDERSON: And I believe those were the only amendments that had been offered to the Indictment?

MR. SCOTT: That's correct.

JUDGE HENDERSON: Is there objection?

MR. TINGLE: No objection, Your Honor.

JUDGE HENDERSON: Mr. Scott, I'm going to ask you then — [10.] I will grant your motion. I'll ask that you amend your Indictment by interlineation. You may take the Court's file to your counsel table.

MR. SCOTT: May I approach the bench, Your Honor?

JUDGE HENDERSON: Yes, sir.

MR. SCOTT: Let the record show that I have amended here in open court by interlineation to make the changes as the Court has recited in the first specification the first count. Counsel have initialed and dated the change on the Indictment.

JUDGE HENDERSON: Could we have the defendant also, since he's being consulted on this matter?

MR. SCOTT: Let the record show that the defendant did initial on the margin the changes made by interlineation with the advice and assistance of his counsel and here in open court.

JUDGE HENDERSON: The Indictment seems to be in order and the Court is going to make certain inquiries of the counsel for the defendant and the defendant as to the proposed entry of the guilty plea. It is necessary that questions be asked and answers thoughtfully given in a case of this sort. I'm going to inquire of the attorneys for the defendant, have you fully investigated the facts and the law of this case and determined whether there exists any question of the admissibility of any claimed [11.] admissions, confessions or other evidence under Federal and State law and advised your client concerning the same?

MR. TINGLE: We have, Your Honor.

JUDGE HENDERSON: Have you informed your client of the elements of the offenses with which he is charged, of all defenses which may be available to him and of all of his Constitutional rights, both State and Federal?

MR. TINGLE: Yes, we have.

JUDGE HENDERSON: Are you willing that your client be sworn?

MR. TINGLE: To the extent of answering questions concerning his waiver of rights, yes, Your Honor.

JUDGE HENDERSON: Mr. Stumpf, do you understand that you have a Constitutional privilege against self-incrimination?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: With a full understanding that anything you say may be used against you and probably will be used against you, are you willing to waive your privilege against self-incrimination and be sworn to tell the truth concerning your understanding of your rights here in this court?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: I'm going to ask at this time then that the Bailiff administer the oath to the defendant.

[12.] (Whereupon, John David Stumpf was sworn to tell the truth.)

JUDGE HENDERSON: Gentlemen of counsel, you may be seated.

MR. STEPHENS: Your Honor, may we approach the bench?

JUDGE HENDERSON: Yes, sir.

(Whereupon, counsel approached the bench and conferred with the Court out of the hearing of the Court Reporter.)

(Whereupon, counsel returned to their tables and the following proceedings were had before the Court.)

JUDGE HENDERSON: I think it would be appropriate that the defendant return to counsel table. Questions will be asked of him by the members of the judicial panel, but it is not necessary that he remain in the witness stand.

Mr. Stumpf, I'm going to ask you a number of questions and if you do not understand those questions you may inquire of your attorneys to better able you to understand everything that is being asked you. These have to do with the rights that you have as a person who has been accused of a crime. Do you understand that you have a constitutional privilege against self-incrimination?

[13.] THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: With a full understanding that anything that you say may be used against you, are you willing then to answer questions with regard to your understanding of your rights?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Now, you heard the questions that I put to your attorneys, I believe, relative to their advice to you and their counseling of you, did you not?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you personally acknowledge that your attorneys have informed and advised you as they say they have?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Are you satisfied with the services which they have performed for you?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Mr. Stumpf, do you have any physical or mental health problems today?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you under the influence of alcohol or any medicine or drug today? Let's take it one at a time. Are you under the influence of alcohol today?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you under the influence of any [14.] medicine or drug today?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Do you understand that you are charged with several offenses? The first offense being that of Aggravated Murder, that there have been two specifications being presented at this time in this particular proceedings, to wit: Aggravated Robbery and Attempted Murder and possession of a firearm while committing those offenses. Do you understand that?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that you have been charged with the offense of Attempted Aggravated Murder, which is a felony in the first degree?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: For the first count, which is that of Aggravated Murder, you are subject to the following penalties: you are subject to being--to a sentence of twenty years without probation, that is, a sentence of life without probation for twenty years; a sentence of life without probation for a period of thirty years and the death penalty by electrocution could be imposed against you. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that you would be subject under the--under specification four to [15.] the first count to three years incarceration before you begin to serve any other sentence?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that the attempted Aggravated Murder, which is set forth in count two, is a felony in the first degree and that you could be sentenced to be incarcerated for a period of four, five, six or seven but not more than twenty-five years? Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that for a felony of the first degree that you could be fined not more than $10,000.00?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: And that you could receive both the fine and the incarceration, which I have mentioned?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Are you presently on probation or parole, sir?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Do you understand that if you plead guilty you will waive, that is, you will give up the right to a jury trial or trial by the Court; the right to be presumed innocent and until proven guilty beyond a reasonable doubt; the right to confront and to question [16.] the witnesses against you and to have compulsory process for obtaining witnesses in your favor; the right to remain silent or to testify at your trial as you may choose and that no inferences may be drawn if you choose not to testify at your trial. Do you understand that you may be giving up those rights?

MR. STEPHENS: Your Honor, with reference to that, we have explained that to the defendant. He was going to respond but we have informed him that there is, after the plea, a hearing or trial relative to the underlying facts so that he is of the belief that there will be presentation of evidence and I wanted to make that clear to the Court with reference to his right of waiver of trial to Court.

JUDGE HENDERSON: I understand that and I appreciate your bringing that to my attention, Mr. Stephens. Of course in the sentencing portion of this trial you do have those rights to speak in your own behalf to present evidence and testimony on your own behalf. My statement to you and my question to you was intended to except those rights that you do have. Counsel, is that satisfactory?

MR. STEPHENS: Yes, sir.

JUDGE HENDERSON: Thank you. Do you understand that if you have made any admission or confession or if any evidence against you was seized, you have the right to have a preliminary hearing on the admissibility thereof [17.] before you plead guilty or are brought to trial. Do you want such a preliminary hearing or do you want the Court to accept your plea of guilty to the counts which your counsel has mentioned?

MR. STEPHENS: Your Honor, we have previously explained to the defendant that he has been afforded at one time an opportunity for a preliminary hearing. He understands that, he does not want any preliminary hearings prior to this plea.

MR. SCOTT: May I address the Court a moment?

JUDGE HENDERSON: Yes, sir.

MR. SCOTT: I think the record should reflect there was a timely motion filed to suppress certain evidence, particularly statements made by the defendant, that the Court has heard the evidence with respect to that motion and has heretofore denied the motion to suppress with regard to those matters.

JUDGE HENDERSON: Yes, sir. Anything further?

MR. SCOTT: Nothing further.

MR. STEPHENS: Nothing, Your Honor.

JUDGE HENDERSON: Do you understand, Mr. Stumpf, that if any promises or inducements have been made to you by any person to cause you to plead guilty that they are not binding upon the Court, that if you plead guilty the

Court, this panel of Judges, will decide your sentence after [18.] considering all of the evidence that is to be presented and evidence in mitigation of punishment and after considering a presentence investigation, report and recommendation approved and prepared by the probation department and that you may receive the maximum sentence prescribed by law. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Have any promises or inducements been made to you, sir, other than the agreement which you have affirmatively acknowledged on the record?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you in fact guilty of count one with specification one and specification four?

MR. STEPHENS: One moment, Your Honor. Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of his right to present evidence at a later time relative to his conduct, but he'll respond to that.

JUDGE HENDERSON: At no time am I implying that the defendant will not have the right to present evidence in mitigation hearing and I do appreciate it, Mr. Stephens, that you bring this to the attention of the Court. And I'm going to ask that the defendant, himself, respond to the question that I asked with that understanding that he has the right to present evidence in mitigation. I'm going [19.] to ask the defendant if he is in fact guilty of the charge set forth in Count one, including specification one and specification four?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: I'm going to ask you if you are in fact guilty of the charge set forth against you in Count two of the Indictment, which is Attempted Aggravated Murder, a felony in the first degree?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: And I'm going to ask you and then I'll explain my question and give you an opportunity to answer. There is a specification to the second count, that of having a firearm on or about your person or under your control while committing the aforesaid offense of Attempted Aggravated Murder. I understand that by reason of the statement of the counsel for the State of Ohio that there are two specifications of a similar purport and that the two will be considered as one, but are you in fact guilty of this specification to the second count?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: The Court would at this time ask the defendant be seated. I'm going to ask that my associates here at the bench have an opportunity to ask such questions at this time as they desire and I'll ask Judge Bettis, is there anything that you desire?

[20.] JUDGE BETTIS: No questions.

JUDGE HENDERSON: Judge Rice?

JUDGE RICE: No questions.

JUDGE HENDERSON: Mr. Scott?

MR. SCOTT: If the Court please, if the Court is inclined at this point after having made full inquiry of the

defendant to accept the--to propose that the defendant actually enter the pleas as proposed and accept the pleas as proposed or as entered, then the State would at that time ask leave to nolle the remaining portions of the Indictment.

JUDGE HENDERSON: Before I get to that point, I would also ask counsel for the defense if there's anything further at this time?

MR. TINGLE: Not at this time, Your Honor.

MR. SCOTT: Could we approach the bench for a moment, Your Honor?

JUDGE HENDERSON: Yes, sir.

(Whereupon, counsel for the respective parties approached the bench, and conferred with the Court out of the hearing of the Court Reporter.)

(Whereupon, counsel returned to their trial tables, and the [21.] following proceedings were had before the Court.)

JUDGE HENDERSON: It has been brought to the Court's attention, and properly so, that the matter of sentencing left to the discretion of the Court in this matter based upon the evidence that is presented and the evidence that is presented in mitigation of punishment and one thing that was not mentioned by this speaker is in the matter of punishment that it is possible that Count one and Count two could run consecutively or concurrently at the instance of the Court. And I want to ask the defendant if he understands that could be the case?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: You understand then that the matter of sentencing itself, within the frame work of the statute with regard to sentences to be imposed in such cases, rests then with this panel of Judges?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Thank you. You may be seated. Now, it is necessary in a capital case that, the Court hear evidence so that it is satisfied that the offenses to which a plea of guilty is offered actually were committed by the defendant. I'm sure that everyone can understand the reason for that. This is a serious offense--offenses I should say, and this panel does not desire to have the [22.] defendant enter a plea of guilty and then the panel not be satisfied that the offense to which the plea of guilty was offered was actually committed by the defendant. So, there will be a proceeding, a trial if you will, as to the necessary elements to establish the guilt of the defendant, even though he offers a plea of guilty. I have asked the defendant if he is in fact guilty of those charges and I'm going to ask him in another form. The defendant has heretofore when he appeared before the Court entered pleas of not guilty to those offenses and I'm going to ask then if the defendant desires to withdraw his pleas of not guilty to the first count and specification one and four and to the second count with its specifications? Is it your desire after counseling with your attorneys to withdraw your pleas of not guilty to those offenses?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Very well. I'm going to ask you now, formally, how do you plead to Count one with specifications one and four?

THE DEFENDANT: Guilty.

JUDGE HENDERSON: How do you plead to Count two with specification?

THE DEFENDANT: Guilty, sir.

JUDGE HENDERSON: You may be seated. Where pleas of guilty are accepted and subject to the presentation of [23.] evidence the Court does find that your pleas have been made freely, understandingly and voluntarily with full knowledge of the nature of the accusation and the consequences of the pleas and without undue influence, compulsion, duress or promise of leniency.

Mr. Scott, you had moved the Court to nolle certain pleas. I'm going to ask that you withhold that action until such time as we have had our evidentiary hearing.

MR. SCOTT: That's fine, Your Honor.

MR. STEPHENS: Your Honor, may we approach the bench?

JUDGE HENDERSON: Yes, sir.

(Whereupon, counsel for the respective parties approached the bench, and conferred with the Court out of the hearing of the Court Reporter.)

(Whereupon, counsel returned to their trial tables, and the following proceedings were had before the Court.)

MR. SCOTT: Your Honor, consistent with the sidebar conference, I would at this time, as previously stated as part of the agreement here, move to nolle the remaining counts, which I believe are three, four and five and also the specifications two and three to the first count and [24.] request that the Court defer ruling on the motion to nolle

until following the evidentiary hearing and the determination of the Court as to the degree of offense the factual basis for the plea of guilty to the first count which I believe is the only one the statute requires an evidentiary hearing upon that is the Aggravated Murder and ask that the Court defer ruling on the motion to nolle until that time.

JUDGE HENDERSON: Is there objection, gentlemen?

MR. TINGLE: No objection, Your Honor.

JUDGE HENDERSON: The Court then will defer ruling upon the motion to nolle.

It is 2:30 and a little bit past that. It would seem appropriate to the Court that the Court recess until 9:00 o'clock tomorrow morning at which time the State of Ohio should be ready then to present evidence with regard to the matters set forth in the Indictment. Is that agreeable with counsel?

MR. SCOTT: For the State, yes, Your Honor.

JUDGE HENDERSON: The Defendant?

MR. TINGLE: Yes, Your Honor.

JUDGE HENDERSON: Then the Court should ask my fellow Judges, is that agreeable with you?

JUDGE BETTIS: Yes, sir.

JUDGE HENDERSON: And with you, sir?

[25.] JUDGE RICE: Agreeable, sir.

JUDGE HENDERSON: Then at this time, Mr. Bailiff, you may adjourn Court for the day.

(Whereupon, at 2:33 o'clock p.m. Court recessed to reconvene at 9 o'clock a.m., September 18, 1984.)

* * *

[26.] (Whereupon, at 9:11 o'clock a.m. September 18, 1984, the following proceedings were had before the Court.)

JUDGE HENDERSON: Case number is 9684. Case is State of Ohio versus John David Stumpf. As announced by the Bailiff, the Judges sitting with me in this case, Judge Bettis on my right, Columbiana County; retired Judge Raymond Rice of Tuscarawas County on my left. I'm John E. Henderson.

I would like to call to the attention of any of the members of the media, the press, television, radio, certain rules for broadcasting and photographing court proceedings called to your attention in this case. That representatives of the media shall notify the Judge in advance of a desire to film, video tape, record, take photographs of a witness at the beginning of the witness's testimony and the filming, video taping, recording or taking of photographs of victims or witnesses who object thereto shall not be permitted. The assignment Commissioner has the entire rule with regard to conditions for broadcasting and photographing court proceedings. Those of you have, in accordance with the rules, asked permission to do so have been given copies of these conditions.

Gentlemen of Counsel, are you ready to begin this [27.] morning with the trial of this case?

MR. SCOTT: State's ready, Your Honor.

MR. TINGLE: Defendant's ready, Your Honor.

JUDGE HENDERSON: Let the record show that the attorneys for the State of Ohio are present and that the attorneys for the defendant are present and the defendant is present in court.

Mr. Scott, do you desire to present an opening statement?

MR. SCOTT: If it please the Court, Mr. Tingle and Mr. Stephens, I would like to briefly state for the Court's information in advance the general scenario of facts which I think the evidence will prove in this case.

On the date of this shooting incident of May 14, 1984, Mary Jane Stout and Norman Stout, husband and wife, both 54 years of age, lived alone in their home located in the western part of Guernsey County about a mile this side of the Muskingum County line and adjacent to Interstate Route 40. The house lies about a hundred yards north of Interstate 40 on County Road 44, which passes beneath the interstate by means of an underpass.

This defendant at that time, John David Stumpf, resided in the area of Cannonburg, Pennsylvania, which is in the vicinity of Washington, Pennsylvania.

Clyde Daniel Wesley, who is a separately charged [28.] defendant with this same crime and who is in the State of Texas contesting extradition, had also previously lived in the same area of Pennsylvania as the defendant; and the two of them were close friends and had associated together prior to Mr. Wesley leaving for Texas, which he sometime ago--at least several months before May 14th he had gone to Texas

to the area of Greenville, Texas near Dallas were his mother, I believe, lives who is Beverly Hickerman.

While in Texas Mr. Wesley met an acquaintance at work while they were working construction one Norman Leroy Edmonds. They decided to leave Texas on May 11th and travel to Washington, the Washington, P.A. area, arriving there on Sunday, May the 13th. They were driving Edmonds' brown and tan 1977 Pontiac Grand Prix bearing Texas license plates QAX 229. Their reason for going to the Washington, Pennsylvania area was Wesley had a former wife and child living in that area. The following day, being Monday, May the 14th, they got together with this defendant in Cannonsburg, Pennsylvania, which I understand is some ten or fifteen miles or so from Washington. They spent the afternoon of Monday, May 14, merely shooting pool and idly passing their time.

Now, at the time they came to Washington, Pennsylvania, Wesley had in his possession a black 25 caliber Armi, A-R-M-I automatic pistol, which he owned for some time, [29.] which he regularly carried. Edmonds had in his car two handguns, a chrome colored 25 caliber Raven automatice pistol and a 9 milimeter black colored automatic pistol, both of which he purchased in Texas within a week or two prior to their leaving for Washington, Pennsylvania.

During the course of the day, that is, Monday, May the 14th of '84, the three of them had been talking about guns and during the course of the afternoon or early evening Edmonds turned his chrome colored 25 caliber Raven automatic over to this defendant, John David Stumpf, and he never did get it back during the course of the events thereafter.

While driving around in the Pontiac automobile and for no apparent reason they came into Ohio and eventually

came into Guernsey County, arriving here somewhere around 9:00 o'clock p.m. or shortly before that. As they approached the overpass in the area of the Stout residence where County Road 44 passes beneath the Interstate 70 they noticed the Stout residence, decided to stop to see what they could steal from the residence. Edmonds was driving the car at the time and at the request of one of the other two, that is, either the defendant or Wesley, stopped the car and the defendant and Wesley left the car and walked towards the house. At that time the defendant still had in his possession the 25 caliber Raven chrome colored pistol [30.] and Wesley had in his possession the 25 caliber black colored pistol. Edmonds remained with the car and the 9 millimeter handgun was still in the car.

As far as Edmonds is concerned, he remained with the car and sometime later he saw the outside lights of the Stout residence go on and saw a car being backed from the garage area of the Stout residence. He became frightened and left, continuing in a westerly direction on Interstate 70 into Muskingum County. By reason of the fact that he was low on gas he stopped at the Norwich exit west of New Concord, pulled up to the station, ordered the gas, went in the station, used a pay phone to make a collect call to his father in Texas. He discovers he had no money to pay for the gasoline when he came back out. He left without paying. There were two young men there passing the time with the station attendant and saw the sequence of events, got in their own car and chased Edmonds in a westerly direction on Interstate 70. At the Zanesville Airport exit Edmonds decided to turn around and go back to Washington, Pennsylvania because he didn't know where his two friends were. He pulled off on the ramp and pulled over to stop. At this time the two young men from the station pulled up behind him, accosted him about the gas. Edmonds fired several shots from the 9 millimeter, frightened them off. He then continued back and went to Washington, P.A. In the

[31.] meantime back at the Stout residence this defendant and Mr. Wesley approached the residence, knocked on the door, was answered by Mr. Stout. They told Mr. Stout they had car trouble and needed to use the telephone. Mr. Stout admitted them, they used the telephone. Thereafter both of them, that is, the defendant and Mr. Wesley each pulled their handguns and told Mr. and Mrs. Stout it was a holdup. While this defendant held Mr. and Mrs. Stout at gunpoint, Wesley looked through the house for items to steal, including the billfold of Mr. Stout from the area of the kitchen table and a 357 caliber Smith and Wesson revolver located in the bedroom. During the course of events they herded Mr. and Mrs. Stout down a hallway to a bedroom where this defendant, John David Stumpf, continuted to hold them at gunpoint. At this point, because of the demeanor and conduct of the defendant, Mr. Stout--or strike that, Mr. Stumpf, Mr. Stout became convinced that both he and his wife were going to be killed any way and he decided to try to rush Stumpf in an effort to try to save his wife, if possible. He did rush the defendant but before he could do anything he was shot in the face and later at a second time in the top of the head, rendering him helpless by this time. Wesley was also--who had been in the other bedroom looking for things, was in the area. He also fired his black 25 caliber handgun one time, but apparently it misfired because [32.] there's no evidence of any further shots fired from that handgun. As a result of his wounds, Mr. Stout fell to the floor in the bedroom across the hallway from where Mrs. Stout was seated on the bed. He was still alive but unable to move from where he lay on the floor. Believing that he had killed Mr. Stout, this defendant than turned the same chrome colored Raven automatic pistol upon Mary Jane Stout as she sat on the bed and shot her four times. Three times in the left side of the head and neck and one time in the wrist, obviously in order not to leave anyone available to identify him. Two of the bullets entered her brain and she died instantly.

Stumpf and Wesley then went to the basement of the Stout residence, taking with them the 357 caliber revolver they gathered up earlier; entered a 1976 Plymouth Fury automobile registered in the name of Mary Jane Stout and stole the vehicle from the residence. They returned to Pennsylvania in the stolen vehicle; abandoned it in the area of Waynesburg, Pennsylvania in an isolated area, after having wiped the car clean of prints. This car was later recovered a day or two later by the Pennsylvania State Police. Thereafter Stumpf and Wesley then went back to a friend's house in Washington where they had been earlier and met up with Edmonds, who had gone to that same location.

Edmonds decided after all these events that happened [33.] that he was going back to Texas but he needed some money to get there. He decided to sell the 9 millimeter pistol he had. The next day, being Wednesday, May the 16th, the three of them went to Cannonsburg where Stumpf, this defendant, arranged for the sale of the 9 millimeter pistol of Edmonds and also the stolen 357 caliber revolver in the possession of Wesley to a man named John Dino, whom the defendant knew. These handguns were later recovered by the Cannonsburg Police Department and turned over to the Guernsey County Sheriff's Department. After the sale was completed, Wesley and Edmonds left for Texas.

In the meantime, the shootings were discovered by the New Concord Police Department about an hour after they took place, as a result of a telephone call from Chris Stout, the son of these two--of Mr. and Mrs. Stout, who was concerned that he received no answer when he tried to telephone.

Upon the discovery of the body of Mrs. Stout the New Concord Police notified the Guernsey County Sheriff's Department, who went to the scene.

In the meantime, with regard to the Muskingum County incident involving the gas station, the two individuals who had chased Mr. Edmonds reported the matter to the authorities by means of the Texas license plate, which the two of them had gotten from the vehicle and tracing the phone call made [34.] from the station they were able to identify Edmonds as the individual involved and issued a warrant for his arrest. He was thereafter arrested in Dallas County, Texas on May the 18th. After his arrest Edmonds was interviewed by Detective William Stout of the Dallas County Sheriff's Department concerning the Muskingum County incident, because the local authorities were proceeding on the assumption that the Guernsey County shooting and the incident in Muskingum County were factually connected. He also interviewed him concerning the Guernsey County shooting. At that time Edmonds gave a statement as to what had taken place and furnished the names of this defendant, John David Stumpf, and Clyde Daniel Wesley as the other individuals involved.

On May 21st arrest warrants were issued for both Wesley and Stumpf and as I mentioned, Wesley is still in Texas contesting extradition. This defendant, John David Stumpf, waived extradition in Washington, P.A. and was returned to Guernsey County by Lt. VanHorn of the Guernsey County Sheriff's Department on May 21, 1984 and has been incarcerated since then.

The Grand Jury of the county returned this Indictment against the defendant on June 14, 1984.

This, in summary form, Your Honor, is the facts the State would expect to prove. I would state that we did--counsel worked some later hour last night. We have an [35.] extensive set of stipulations in the process of being typed. We anticipate that those will be available before noon, but at

this time I would like to proceed with the presentation of some live testimony.

JUDGE HENDERSON: Mr. Tingle, do you have any statement you wish to make?

MR. TINGLE: If the Court please, the hearing at this time, our understanding that that hearing and this proceeding is to establish that there is a basis in fact for the pleas of guilty entered by this defendant, pleas to the first count of the Indictment with the first specification, being the specification which does authorize the death penalty in this case. Following the hearing for this limited purpose the defendant anticipates proceeding then to a mitigation hearing at which time further evidence will be developed on behalf of the defendant. Suffice it to say, there are some disputes with some of the factual situations stated by the Prosecutor on some of the essential facts – much has been stipulated and will be offered to the Court in the form of a stipulation by agreement of counsel and the defendant. But at this time the scenario as outlined by Mr. Scott does follow the sequence of events as they did occur, except for the statements as to the actual shooting of Mary Jane Stout, which the defendant believes the evidence will show occurred at the hands of Daniel Wesley. The same Daniel Wesley who [36.] just prior to that time shot a passing motorist in Belmont County, Ohio. The evidence will also show, we believe, that the shooting of Norman Stout occurred in a moment of panick not in a moment of prior calculation and design. The evidence will also show that upon learning of the warrant having been issued for his arrest in Pennsylvania this defendant did turn himself in to the Pennsylvania authorities and since that time has been held in custody. Thank you.

JUDGE HENDERSON: Thank you. Mr. Scott?

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IN THE COURT OF COMMON PLEAS
IN AND FOR THE FIFTH DISTRICT
COURT OF APPEALS, GUERNSEY
COUNTY, OHIO

CASE NO. 9684

STATE OF OHIO

APPELLEE,

vs.

JOHN DAVID STUMPF

APPELLANT.

Transcript of the Proceedings held on September 17, 18, 19, 20, 21 and 24, 1984 before the Honorable Judges John E. Henderson, J. Warren Bettis and Raymond Rice.

APPEARANCES:

JAMES R. SCOTT
C. KEITH PLUMMER
Prosecuting Attorneys
139 W. 8th St.
Cambridge, OH

For the Appellee,

LEWIS M. TINGLE
CRAIG M. STEPHENS
Attorneys at Law
138 N. 7th St.
Cambridge, OH

For the Appellant.

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CLERK OF COURTS
GUERNSEY COUNTY

* * *

[371.] in the record as I recall it was because of things that had happened earlier or because of things that had happened before. So, I would still assert that the entire matter of the events in Belmont County are irrelevant to any material issue in this case. It seems to me that there are -- Wesley is not the defendant on trial here today, his conduct.

JUDGE HENDERSON: Thank you, Mr. Scott. The proffer will be admitted. Mr. Tingle, you indicated that you had motions? You have not officially rested your case yet.

MR. TINGLE: If the Court please, I indicated two motions. The first motion very briefly is for notwithstanding the entry of the plea of the defendant of guilty to the first count and the specification for a judgment of acquittal on behalf of the defendant at this time.

JUDGE BETTIS: Aren't you premature on that until you rest?

MR. TINGLE: I don't believe so, Your Honor, at this point at the close of the State's case.

JUDGE BETTIS: Oh, okay, you can make it both times.

JUDGE HENDERSON: There is more than one charge here, Mr. Tingle, and are you asking for acquittal on all charges?

MR. TINGLE: Yes, Your Honor.

MR. SCOTT: May I address the Court?

[372.] JUDGE HENDERSON: Mr. Scott, do you wish to be heard?

MR. SCOTT: If it please the Court, we are not in a situation where this is a trial on the merits before this Court. We have a guilty plea here to the charge of Aggravated Murder and a guilty plea to specification one, I believe it was, and it seems to me that's the only charge where the Court is required to hear any evidence on the plea of guilty and the gun specification as to the first count. The plea of guilty to attempted Aggravated Murder and plea of guilty to that specification of that count does not require the presentation of any testimony to show a factual basis for that plea. So, therefore, the testimony that we presented directed itself solely to the first count and the specifications to the first count. I don't believe the State has the burden of proving beyond a reasonable doubt the same as if we were working on a not guilty plea. It seems to me we merely present sufficient evidence to this Court to find there's a factual basis to support each and every element of crime of Aggravated Murder and the necessary factual basis for the aggravating circumstances set out in the first specification . There's ample evidence in this case to show that this was a purposeful killing of Mrs. Stout when she's shot four times. there's ample evidence, which, if [373.] believed at this point, I think the Court at the conclusion of the State's case--I suppose that rule still applies, that you construe the evidence most favorably to the State at this point in time. There's ample evidence to conclude that this defendant fired all shots that hit anybody, because the same gun fired all of those shots. He has, by his own admission, had this chrome colored gun in his hand at the time that he fired the shots into

Mr. Stout. Mr. Stout identified the gun as the chrome colored gun. The ballistics people said it was not the black gun. The black gun, however, was fired in that house because the bullet came out of the mattress from that gun. There are no other bullets that match that gun. All the rest of them came from a different gun consistent with the Raven. The only evidence in this case that the gun ever left this defendant's hands, that is, the Raven, the missing Raven is his own statements which are in conflict. He has done his level best to get that gun out of his hand and has two or three different stories. You construe all that evidence favorably to the State. There was certainly completed in the course of an armed robbery, it was a purposeful killing of Mrs. Stout, obviously after he shot and believed he had killed Mr. Stout. The only plausible explanation for his then shooting and killing Mrs. Stout . The only plausible explanation for his then shooting and killing Mrs. Stout as she sat on the bed was to prevent apprehension for the [374.] crimes he had previously committed, being the armed robbery, and the attempted aggravated murder of Mr. Stout.

Therefore, I say the State has carried its burden of presenting this Court with credible evidence to show a factual basis for each and every element of the crime of Aggravated Murder and the aggravating circumstances set forth in the specification one.

JUDGE HENDERSON: Does the defense desire to be heard further on this question?

MR. TINGLE: Not on this question, Your Honor.

JUDGE HENDERSON: Your motion is overruled.

MR. TINGLE: At this time the defendant rests.

JUDGE HENDERSON: Are we ready then for--do you have another motion?

MR. TINGLE: Yes, Your Honor. At this time we would renew the motion previously made for a judgment of acquittal notwithstanding the entry of the pleas and also another companion motion to that that I would like to argue and present to the Court at this time.

JUDGE HENDERSON: Very well.

MR. TINGLE: Mr. Scott has indicated this hearing that we have been involved---

MR. SCOTT: Is there a motion to be heard before the argument is given? I mean, a motion to be presented?

MR. TINGLE: I have just started. I will get to that.

[375.] JUDGE HENDERSON: He has not made a motion yet.

MR. SCOTT: All right. I'm sorry. I didn't mean to interrupt.

MR. TINGLE: As a preliminary matter to that motion, Mr. Scott has indicated this hearing is to determine as to the first count and it's aggravated circumstances of the specification. The basis of the evidence to support the plea of the defendant. At this time on behalf of the defendant, we would move the Court to eliminate from the potential penalties available in this case the death penalty on the basis that the evidence as submitted is not sufficient under federal law as applied to the State of Ohio to sustain that potential penalty in this case. A conviction of aggravated murder can be obtained without the possibility of a death penalty if the specification is not included. Therefore, by logic the only

way that a death penalty can be arrived at as a potential penalty is by the inclusion of a specification of aggravating circumstances. The specification in this case requires that proof be submitted to this Court that John Stumpf purposely caused the death of Mary Jane Stout to escape detection, apprehension or punishment for the robbery and for the attempted killing of Norman Stout. Now, it is obvious that you must have specifically intended the death of Mary Jane Stout in order to sustain a conviction of that [376.] offense, which would then in fact authorize the death penalty as a potential penalty in this case. A review of the evidence indicates that there is no direct evidence to support that contention.

The testimony of Chris Stout did not offer any direct evidence on that question. The testimony of Dr. Larrick did not offer any. The testimony of Dr. Arejola, Sgt. Warner, Sgt. McCauley and Detective Simms offered no direct evidence of that. Lt. VanHorn's testimony offered no direct evidence of that except for the statements he obtained from the defendant himself. Those statements indicate that Mr. Wesley is the one who shot Mary Jane Stout. The testimony of Norman Edmonds contains no information and no direct evidence as to the conduct of any of the individuals within the Stout residence. The testimony of Norman Stout contains no direct evidence as to the actual shooting of Mary Jane Stout and Mr. Dye from BCI offered no direct evidence of the shooting of Mary Jane Stout by this defendant.

Now, based upon the evidence and taking all of the evidence there is no direct evidence of that fact. The State's case is composed of circumstantial evidence through the analysis of bullets, through the speculation as to a gun which has not been analyzed or presented in evidence and even assuming in taking the admonition this Court would [377.] give to the jury on circumstantial evidence, that evidence is not sufficient but--and it is a distinction that we have strongly

urged to the Court that we are not arguing more than the question that the death penalty as a potential penalty is not authorized in this case. That is the urging that we are taking at this point. Now, if we are to assume that the Raven pistol which has been testified to concerning this case was and if we are to assume that it is proved that this was the murder weapon, then assuming that we are being asked to assume in addition to that that this defendant fired that Raven pistol into Mary Jane Stout. We're taking two assumptions to get to that point. Clearly to base a decision of intent on an inference on an inference is not authorized.

Now, implied within the State's case are the aider and abettor statutes and complicitor statutes, but in 1982 following the direction indicated by the United States Supreme Court in Lockett, which was a clear direction not only as to what must be considered in mitigation but a clear direction as to what evidence was necessary to sustain a conviction where a death penalty was authorized. In 1982 the court decided Edmonds versus Florida. That case in quoting from some of the language of that case, it involved a Florida crime in which an instruction had been given that in order to sustain a [378.] conviction of first degree murder while engaging in the perpetration of or the attempted perpetration of the crime of robbery, the evidence must establish beyond a reasonable doubt that the defendant was actually present and was actively aiding and abetting the robbery and attempted robbery in that the unlawful killing occurred in the perpetration of or the attempted perpetration of robbery. That was the instruction Florida relied upon. In other words, the felony murder. A conviction was obtained. A death sentence was imposed upon a person who was not actually the person who fired that gun. Now, the Florida Court explained that the interaction of the felony murder rule and the laws of principle combined to make a felony generally responsible for the lethal action of his co-felon. The holding in Edmonds clearly and unequivocally disagrees

with that position. The Court stated that we have concluded the imposition of the death penalty in these circumstances is inconsistent with the 8th and 14th Amendments. The Court analyzed the death penalties across the United States in the 50 states finding of the 36 states authorizing the death penalty eight authorized death and felony murder situations. Four of the states found that felony murders were not capital offenses and eleven required some culpable mental state as a prerequisite as a conviction where the death penalty [379.] is authorized. Of these eleven, eight make knowing, purposeful or intentional premeditated killing of the captor. Ohio is found within that group of eight. As noted by the Court at page 1147. Now, an accomplice is not guilty of capital murder unless she intended to kill and that is the language cited by the Court in its note.

Clearly the United States Supreme Court will not approve a sentence of death when there is no direct evidence that the defendant actually fired the fatal shot and just as clearly the prosecutor has established a robbery, a non-fatal shooting, but from that point he is basing his specification to Count one on circumstantial evidence.

Therefore, it is our position and we move the Court that the death penalty in this case be determined to be not available as a potential penalty in this case.

If the Court please, I do have copies of the Edmonds decision for the Court's review.

JUDGE HENDERSON: Mr. Scott?

MR. SCOTT: I'd like to address Mr. Tingle addressed certain things here. I'd take them one at a time.

As a purpose to kill, whoever shot Mrs. Stout didn't intend to do her any favors when he shot her four times. It

seems to me that shooting a person four times shows what your intent was. So, I think their arguing there was [380.] no purpose to kill Mrs. Stout is ridiculous. Now, this specification one is not the felony murder rule. This specification deals with a killing in order to escape detection, arrest, apprehension, etc. of a previously committed offense. The felony murder rule in Ohio as a matter of the death penalty is set out in subsection seven, which requires that the person committing those named offenses be the principal offender or that the killing be with prior calculation and design. That is the felony murder rule and Ohio has put that language in to comply with Lockett and this other case. This specification one is not the felony murder rule. This is a specification of an aggravating circumstance wherein a person commits a felony, aggravated robbery or attempted aggravated murder and then the killing of the other person, here, Mary Jane Stout, was committed to avoid apprehension, detection, arrest, prosecution. This is not a felony murder case other than the principal charge itself, that the purposeful killing resulted during the commission of the aggravated robbery but as to the aggravating or death penalty specification this is not a felony murder case. That falls under sub-paragraph seven, which says the offenses committed while the offender was attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, etc. and was the principal offender or if not the [381.] principal offender, committed the aggravated murder with prior calculation and design. That's Ohio's felony murder specification. That is not what we are dealing with and that is not what this defendant has entered a plea of guilt to. Aside from that--so my position is we need not prove that this defendant was the principal offender for that specification one to be applicable, if proven. But, be that as it may, there is ample evidence--I know of no rule ever, anywhere in any court that says circumstantial evidence may not properly be considered in a capital murder case. Mr. Tingle says there's no direct evidence. There is direct

evidence that this man had a chrome colored Raven automatic in his position when he left the vehicle, by his own admission in one of his statements. He did his best to get that gun out of his hands in later statements. There is ample testimony from Mr. Stout that he had a chrome colored automatic pistol in his hand when he shot him between the eyes. There is expert testimony that the same bullets, the bullets that entered the head of Norman Stout were fired from the same gun as the bullets that entered the body of Mary Jane Stout. So, there's ample testimony here from which this Court may make a reasonable inference that the same person fired those things, particularly considered the testimony of Mr. Stout that at first recollection after [382.] he went down and after being shot was two person were talking and then the shots were fired. If you look at the defendant's statement he says I was in a state of shock, I left the area, went downstairs. I didn't even hear any shots. There wasn't sufficient time for two people to be talking. He said it was less than a minute and then to go downstairs? You have to believe without qualification one of the versions given by this defendant to get that gun out of his hand. This court as the trier of fact is the one to determine what testimony to believe and which not, but one thing that concerned me we're not here arguing, that the State has proved this case beyond a reasonable doubt. Is there a factual basis for the charge of aggravated murder as set forth in count one of the Indictment and is there a factual basis on the evidence to say that the facts required in specification one have been proven? I say there is. What other possible reason a defenseless lady sitting on her bed in a bedroom for somebody to shoot her four times other than the most logical and obvious explanation, that they thought they had already killed Mr. Stout in the process of an armed robbery, therefore they leave no survivors who can identify them. As a matter of fact, his first statement given to VanHorn he was under the mistaken belief there were no survivors, so he denied even being in the place. After he [383.] found out there was a survivor who

could possibly identify him the story changed a little bit more. Then, finally he does his level best to get that gun out of his hand because he said he had the black gun in his hand. In the third statement that he gave VanHorn the summary, he had the black gun in his hand during the entire sequence of events, when we know that could not possibly be true because he admits shooting Mr. Stout and the black gun did not shoot Mr. Stout. So, I say to you, yes, the State has carried the burden at least of showing a factual basis that the crime of aggravated murder was committed and the factual basis for the aggravated circumstance that it was committed to avoid detection, arrest, etc. for the previously felonies of aggravated robbery and attempted aggravated murder and that is not the felony murder rule nor the problem addressed by Lockett or this Florida case. Ohio has addressed that problem in sub-paragraph seven by saying if you're going under the felony murder rule you've got to prove he's the principal offender or that killing, the aggravated murder, was with prior calculation and design.

JUDGE HENDERSON: Anything further, Mr. Tingle?

MR. TINGLE: Briefly, Your Honor. Mr. Scott has indicated, and I don't want to belabor the point or the evidence, but I think it is significant to note that we are [384.] arguing the evidence at this point, or Mr. Scott is.

What my statement concerning circumstantial evidence and Mr. Scott said you would have to believe the defendant's statement without qualification and basically and very definitely the instruction concerning circumstantial evidence goes to the heart of that point. Circumstantial evidence can justify finding only if the circumstances are entirely consistent with the defendant's guilt and wholly inconsistent with any reasonable theory.

Mr. Scott has indicated you would have to believe without qualification what is contained in the defendant's statement. That is consistent with the theory of innocence but as I indicated previously, it is entirely possible for this Court to make its finding that the State has sustained a burden as far as the first count of the Indictment is concerned, but without proceeding to a mitigation stage simply by finding that in this case because of the evidence the state of the evidence, the death penalty is not authorized under Edmonds and that is our position. Thank you. If the Court please, I do have copies of that to submit.

JUDGE HENDERSON: The motion of the defendant is overruled and denied. I believe then that all evidence has been introduced. I would suppose that there is no rebuttal evidence, is there, Mr. Scott?

[385.] MR. SCOTT: There's nothing to rebut, Your Honor.

JUDGE HENDERSON: Then it would be next in order that the Court would hear the argument of counsel on this phase of the trial. Do you desire to have time?

MR. SCOTT: Your Honor, I'd waive further--I feel like I've given you my best shot what I think the evidence has proven and where we stand as far as the State sustaining the burden, as I understand it to be. There's a factual basis from the evidence that the crime of aggravated murder was committed to the extent that the guilty plea should be accepted and the finding of guilt entered and that the facts alleged in the specification to which the plea of guilty was entered have likewise been proved. I would waive further argument.

JUDGE HENDERSON: I'm going to---

MR. SCOTT: Reserving the right of rebuttal.

JUDGE HENDERSON: I'm going to ask the defendant if he desires to make a closing statement, a closing argument and possibly, Mr. Scott, depending upon his answer you may wish to reconsider your waiver.

MR. TINGLE: We have nothing further at this time, Your Honor.

JUDGE HENDERSON: You have no argument?

MR. TINGLE: No.

JUDGE HENDERSON: And you have no argument?

[386.] MR. SCOTT: I've waived further argument, Your Honor.

JUDGE HENDERSON: Very well. Then the Court is going to take this evidence under advisement and will announce its decision and would like to speak with counsel here at the bench.

(Whereupon, counsel for the respective parties approached the bench, and conferred with the Court out of the hearing of the Court Reporter.)

(Whereupon, counsel returned to their trial tables, and the following proceedings were had before the Court.)

JUDGE HENDERSON: We stand adjourned for today and this Court will reconvene at 1:00 o'clock tomorrow afternoon.

(Whereupon, at 3:33 o'clock p.m. Court recessed to reconvene at 1:00 o'clock, September 20, 1984.)

[387.] (Whereupon, at 1:08 o'clock p.m. September 20, 1984, the following proceedings were had before the Court.)

JUDGE HENDERSON: This is case number 9684. The title of the case is The State of Ohio versus John David Stumpf. I'm John F. Henderson, Guernsey County, and sitting with me on my right is Judge Bettis from Columbiana County and Judge Rice from Tuscarawas County. Judge Bettis and Judge Rice are sitting by designation of the Supreme Court in thise case, a three Judge panel.

Counsel present for the State of Ohio, Mr. Keith Plummer, Assistant Prosecuting Attorney and Mr. James Scott, Prosecuting Attorney of Guernsey County, Ohio. The defendant is present in court together with his attorneys. The attorneys are Mr. Lew Tingle and Mr. Craig Stephans of Ravens and Portgage County. Mr. Tingle from Guernsey County.

This trial began on Monday of this week and has been continued each day since. And on yesterday the parties rested and the Court thereupon considered the evidence as it had been presented.

By way of review, I would say that on Monday of this week the defendant withdrew his plea of not guilty to the first count and to the first specification as amended [388.] of the first count and the fourth specification and withdrew his plea of not guilty to the second count and to the specification thereof and did then in open court enter a plea of guilty to those counts and to the specifications named.

The Court has considered the evidence and has reduced its decision to writing, which I will now read into the record.

This matter came on for hearing in accordance with section 2945.06 of the Revised Code of Ohio. The defendant heretofore having waived a trial by jury and having requested a trial to a panel of three Judges, thereafter the defendant entered a plea of guilty to Count one of the Indictment and specification one, as amended to Count one and specification four to count one. The defendant further entered a plea of guilty to Count two of the Indictment and specification of Count two.

The Court, in accordance with Section 2945.06 of the Revised Code of Ohio, heard the testimony of the witnesses and determined that the defendant is guilty beyond a reasonable doubt as charged in Count one of the Indictment and is guilty beyond a reasonable doubt of specification one, as amended, to Count one and specification four in Count one.

The Court further determines that the defendant is [389.] guilty beyond a reasonable doubt as charged in Count two of the Indictment and guilty beyond a reasonable doubt of the specification of Court two, as set forth in the Indictment.

That is the decision of the Judges. They have signed this Judgment Entry, each one of them and it is the combined decision of the Court.

Mr. Scott, do you wish to be heard at this time?

MR. SCOTT: If it please the Court, at the time the pleas of guilty were entered, the State at that time moved for leave to nolle pros the remaining matters in the Indictment and that motion was taken under advisement or deferred at that time. At this time, then, the State would renew the motion to enter a nolle pros as to specification and three to the first count and a nolle pros to the third count and the

specification to the third count and a nolle pros to the fourth count and fifth count in the Indictment.

JUDGE HENDERSON: Mr. Scott, you then are seeking to nolle all matters in an Indictment other than those upon which the Court has now ruled, is that correct?

MR. SCOTT: That is correct, Your Honor.

JUDGE HENDERSON: Does the defense care to comment or to object to the motion that he has been made?

MR. STEPHENS: No, Your Honor.

* * *

IN THE COURT OF COMMON PLEAS
IN AND FOR THE FIFTH DISTRICT
COURT OF APPEALS, GUERNSEY
COUNTY, OHIO

CASE NO. 9684

STATE OF OHIO

APPELLEE,

vs.

JOHN DAVID STUMPF

APPELLANT.

Transcript of the Proceedings held on September 17, 18, 19, 20, 21, and 24, 1984 before the Honorable Judges John E. Henderson, J. Warren Bettis and Raymond Rice.

APPEARANCES:

JAMES R. SCOTT
C. KEITH PLUMMER
Prosecuting Attorneys
139 W. 8th St.
Cambridge, OH

For the Appellee,

LEWIS M. TINGLE
CRAIG M. STEPHENS
Attorneys at Law
138 N. 7th St.
Cambridge, OH

For the Appellant.

FILED COMMON PLEAS COURT
1984 DEC-3 AM 8:47
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CLERK OF COURTS
GUERNSEY COUNTY

* * *

[514.] matter of presenting final argument of counsel and the Court is aware that occasionally as you finish the presentation of evidence that there needs to be just a few moments in order to collect your thoughts before you present your final argument and at this time the Court will stand in recess for ten minutes.

(Whereupon, a short recess was had.)

(Whereupon, the following proceedings were had before the Court.)

JUDGE HENDERSON: Mr. Tingle, are you ready to present the argument on behalf of the defendant?

MR. TINGLE: Yes, Your Honor.

JUDGE HENDERSON: All right. Proceed then.

MR. TINGLE: If it please the Court, Mr. Scott and Mr. Plummer, at this juncture of this proceeding we are in a unique situation. That situation of not arguing the guilt or innocence of an individual but only the statutory specifications or requirements, the mitigating factors and the aggravating circumstances. The end result of that being the determination of a penalty appropriate to this defendant. As I stead, the question is no longer guilt or innocence. John Stumpf has admitted his guilt to this Court and the Court has so found it. The basic question [515.] is that of establishment

of the mitigating factors as provided by the statute and whether or not they are outweighed by evidence presented by the Prosecuting Attorney beyond a reasonable doubt, if they outweigh those mitigating factors. And it is in that context that my comments will be made and only in that context as it relates to the actual guilt of the defendant but only as it relates to the appropriate penalty.

2929.04 provides for a list of mitigating factors that are available for the Court's consideration. One of those factors is that whether it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation. Obviously in this case we have not had the dictionary definition of duress, coercion or strong provocation. But, we have had evidence of influence, of the character of the defendant and I think a closer look at the character of the defendant reveals that his conduct is not in his character as has been shown by the witnesses who have t testified here. It has show that John Stumpf is a person who is easily influenced. He's not a leader. He's a follower. And one of the leaders that he has had during his life has been Clyde Daniel Wesley. As indicated from one of the items submitted here today by the State, a previous problem with that this defendant encountered with [516.] the legal system was in conjunction with Clyde Daniel Wesley.

The other evidence available in this regard is John's handling of intoxicating beverages as one witness testified two beers and he was looped. Yet on that occasion on May 14th we had a car full of beer with three individuals who were drinking steadily throughout the day and John's influence or susceptibility to influence was much greater at that point then it would have been at any other time.

We have evidence of the violent character and nature of Clyde Daniel Wesley, which is in stark contrast to the

testimony that we heard concerning the character of John Stumpf. The prior senseless shooting on Route 40 in Belmont County by Clyde Daniel Wesley in which there is nothing to infer that John Stumpf intended that or concurred in it in any respect.

The evidence that John has offered you that he was afraid of Clyde Daniel Wesley; the evidence that was offered from a number of witnesses who took that stand as to John's feelings toward women, his respect for them, his willingness to help them, that he truly did respect women; the conduct for which he is before the Court is totally out of character for him.

Another factor to be considered by the Court is the youth of the offender. John was 23 years old at the time [516.A.] of this offense as stated by his mother. His mental capacity was somewhat limited as testified, going back to his grade school days at which he worked and there was no indication that he was not wiling to do the work, but the results just weren't there. He could try as hard as he might, but the results were never achieved. And it's not just the chronological age of the defendant that's to be considered. It's the youth of the defendant, his emotional age as well as chronological age. I think there is no question that John's emotional background is limited and very limited at that, as indicated by his teacher, by everyone who took that stand.

Again, John wasn't the leader. John was the one back in the crowd. John was the follower. It wasn't in his character to take the initiative in something like this. That is a factor that the statute provides for this Court's consideration. It's a factor that has been established.

John lived at home, never married, he had no children. The immaturity is apparent from the evidence that this Court has heard.

Another factor is the offender's lack of significant history of prior criminal conduct or criminal convictions and delinquency adjudications. There is no evidence of his delinquency adjudications offered in the presentence [517.] report. You have evidence of DWI conviction. We have evidence of a theft offense and disorderly conduct, as submitted here today. But the statute doesn't just say criminal convictions, it says the lact of significant history of prior criminal convictions. The items that have been submitted to the Court don't constititutes a significant history of criminal convictions. This is not an individual who has been convicted of a series of armed robberies, a series of breaking and enterings, a series of violent offenses. Obviously he does have something on his record, but they are not of the significant nature the statute looks to.

It is also interesting to note that the death offense, as indicated to the Court, was again in the presence of and for the benefit of Clyde Daniel Wesley.

Another factor is that the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim.

Now, again, I must stress to the Court that I am making these comments only in the context of a mitigation hearing and mitigating factors. You look at the evidence before the court, which the State offered the statements of the defendant. We look at the statement made to this [518.] Court today by the defendant John Stumpf. They indicate to this Court that he was not the principal in the offense. He was not the principal in the acts that led to the death of the victim. The evidence indicates, as John told you here today and consistent with his statement of May 22, 1984, that it

was in joining Clyde Daniel Wesley and Mr. Edmonds in their vehicle and traveling down the road and drinking that John Stumpf saw Clyde Daniel Wesley shoot another individual; that they stopped at the house or along the road at the suggestion of one of those individuals; that they went to the house at the suggestion of Clyde Daniel Wesley; that the gun was produced from Clyde Daniel Wesley and it's significant to note that the guns involved in this case that came from that vehicle whether they were used in this offense or the one in Belmont County were guns brought to this area by those two individuals, Clyde Daniel Wesley and Norman Edmonds; that upon reaching the house John's statement to you is consistent with the evidence again, that upon entering the house a robbery did take place; that Clyde Daniel Wesley was moving through the house obtaining the various items that were to be taken; that John's participation at that point as in standing and watching and holding a gun at that point. Certainly he became nervous. There's no question about that and that is consistent with Norman [519.] Stout's testimony. He was nervous. The pull man throughout that whole thing was Clyde Daniel Wesley who knew what he wanted and how he was going to do it. Upon Norman Stout's move from the bed and consistent with the evidence this Court has heard, John reacted in panic and fired a shot and John has admitted that to this Court and in his statements. Contrary to what Mr. Stout believes, I think the evidence, the physical evidence, the testimonial evidence in this court supports without question the fact that that first shot that hit Mr. Stout did not occur to the area of his glasses and the nasal area, as testified. It is entirely inconsistent with the fact that the first shot hit Mr. Stout as he came up off the bed and lunged toward John Stumpf. He was hit in the vertex at that time from traveling low from the bed to the point where he encountered the defendant. Going to the other room where he encountered Clyde Daniel Wesley and the altercation in that room the blood on the walls, the glasses on the floor in that room, the bullet fragment in that room are

consistent with the fact that Norman Stout was actually shot in the nasal area in bedroom number one. Consistent, also, is the fact that John Stumpf stated that he was scared at that point. He knew there was a problem. He knew he was in trouble. He knew that and he didn't want any further part of the situation. He left the house. He [520.] went downstairs. He went out of the house and had to be called back by Clyde Daniel Wesley to get him to drive the car. Again, Clyde Daniel Wesley using John Stumpf to drive the vehicle. It is at this point that Norman Stout was shot the second time in bedroom number one. John Stumpf is gone. The guns had fallen to the floor, been knocked from the hands, had been picked up and retrieved by John Stumpf and that gun fired and it fired at Norman Stout, but it's also as equally obvious that the only way that the bullet hold came into the mattress in that room is at that point Norman Stout was shot by John Stumpf the second time. The bullet entered the mattress and it remained there where it was recovered by the Guernsey county Sheriff's Department. If the State believes that the fragments of bullets are inconsistent with the way this happened as I've stated it, it must also then explain nine bullets and eight casings because that's what it would entail. The fragment of the bullet found in bedroom number one is the fragment that did the damage to Mr. Stout in the nasal area. That is consistent with the eight casings found, not with nine shots being fired. Upon leaving the house John Stumpf went outside, was called back and drove the vehicle away. The only one left in that house when he left was Norman Stout laying on the floor, was Mrs. Stout still in the bedroom number two and Clyde Daniel [521.] Wesley who had at that time after John had picked up the gun from the floor in bedroom number one, the Chrome plated Raven. John indicated this information in his statement of May 22. He has also stated it here today. It is consistent with the physical evidence and the testimony the State has offered, but once again I am stressing very strongly that his is offered in the context of this mitigation hearing.

Now, other factors that bear upon that point of whether or not this defendant is the principal offender in that or the principal in the acts that led to the death of the victim. The State of Ohio nolled as part of our situation here in our entry of a plea and we are only dealing with one of the specifications that is before the Court. The specifications nolled that are no longer before the Court was that John was the principal offender in the commission of the offense of Aggravated Murder of Mary Jane Stout. That specification is no longer before the Court. The evidence is absolutely consistent with the fat that Clyde Daniel Wesley is the one person who shot Mary John Stout on that occasion. There are other factors that are relevant to the issue of whether the offender should be sentenced to death. The statute speaks of those and it does leave it somewhat open ended, but they are factors that the Court can consider. Anything that may be [522.] relevant to it. Relevant to the Court's consideration also are the fact that Clyde Daniel Wesley has also been accused of being the principal in this case. The Indictment that is before the Court in evidence. Also relevant is the fact that we heard the testimony of Norman Edmonds in this court who, by his testimony before this Court, it is apparent that he is a co-participant in an Aggravated Murder, Aggravated Robbery and a theft, but a factor to be considered in mitigation at this point is the sentence agreed upon in which in all likelihood that individual will receive a 7 to 25 sentence concurrent with the sentence received for his felonious action in Muskingum County.

Now, even accepting the State's argument that John Stumpf is the principal offender in this crime, it does not foreclose the Court from considering all of these factors. As I have stated, John Stumpf has admitted guilt of the crimes as charged in the Indictment under the first count, but in considering the evidence for mitigation purposes we believe that the burden of proof imposed upon us which can be stated

to be a preponderance has been sustained. The aggravating circumstances--and again referring back only to the specification to which the defendant entered his plea, the aggravating circumstances have not been proved beyond a reasonable doubt to [523.] outweigh those mitigating factors. It is with that in mind that we believe the death sentence in this case is not an appropriate penalty. We believe the appropriate penalty in this case to be a sentence of life in prison for the crime that was committed for which John Stumpf has entered a plea of guilty with no parole possibility for twenty full years plus a sentence on the specification charging a weapon having been involved for an additional three years, plus a sentence on the attempted aggravated murder of seven to twenty-five years. Thank you.

JUDGE HENDERSON: Mr. Scott, proceed.

MR. SCOTT: If it please the Court and counsel---

JUDGE HENDERSON: I would note for everyone's information that Mr. Tingle, his presentation, was for twenty minutes. That's not binding upon anybody, but I thought you might like to know.

MR. SCOTT: If it please the Court, the only question at this point in this trial or in this proceedings which is before this Court is whether or not the defendant has in fact proved the existence of any mitigating factors as set forth in Ohio Revised Code Section 2929.04, and if so, whether or not those mitigating factors as so presented and proved outweigh the aggravating circumstances which this Court has found proven beyond a reasonable doubt as set forth in the first specification as amended [524] to the first count. The amended /first specification to the first count in order to keep things in clear focus reads as follows: The Grand Jurors further find and specify under Ohio Revised Code Section 2929.04(A)(3) and in compliance with Ohio Revised Code

Section 2941.14 that the aforesaid offense, that is, the aggravated murder of Mary Jane Stout was committed for the purpose of escaping detection, apprehension, trial or punishment for other offenses committed by the above named John David Stumpf, to wit: Aggravated Robbery and Attempted Aggravated Murders, being the attempted aggravated murder of Norman Stout and to which the defendant has entered his plea of guilty. That is the actual precise issue before the Court at this stage of these proceedings. I don't propose to review the evidence in any great detail. This Court heard the evidence, has considered the evidence and has already rendered its decision as to whether the evidence proves the charge of aggravated murder beyond a reasonable doubt and proves the first amended specification to the first count.

I would simply comment that this defendant and his co-perpetrator, Mr. Wesley, chose the Stout residence at random, having no prior connection with the Stouts. No other reason to choose that residence other than happen to be there and they happened to notice it. It appeared [525.] convenient and it appeared vulnerable, obviously, begin somewhat isolated from other residences and being close to the interstate. As to what they their purpose was in going to that house, the only stated purpose was to use the telephone but one way or the other, if you believe the defendant's unsworn statement that he was handed this chrome colored gun by Wesley, nevertheless the two of them went to that house armed with loaded 25 caliber automatic pistols. I don't know that it's necessary for two people to go armed to use the telephone. Thereafter, they approached the house and were admitted on the subterfuge that they were having car trouble and needed to use the telephone. They did enter. According to Norman Stout--the question has been raised who's the leader and who's the follower. According to Mr. Stout, this defendant, Mr. Stumpf, did most of the talking as to what their problem was, what they wanted to do, he's the

one that used the telephone, which is contrary to the unsworn statement of the defendant. The defendant after he used the telephone or purported to use the phone, whichever, the case may be, wiped the receiver clean, which is something unusual and for a particular purpose, obviously, eliminating any fingerprints. It seems to me that all of these actions of the defendant speak louder than anything he can say in an unsworn statement or any [526.] of the statements in evidence as to what their purpose was in going to the Stout residence that night.

As to their actions inside the house, I think Mr. Stout testified that they seemed to work as a well coordinated team. there was no stumbling around or delay, I think was his testimony, was to the effect that at no time were we left unguarded, did we have any opportunity to do anything to extricate themselves from the situation they were in, which leads to the inference that perhaps this is not the first time that they had done these things as a team. To say then, it was very clear what their purpose was.

As to the shooting itself, Mr. Tingle gave a very nice narrative story, but the Court has heard the evidence and a lot of those things are pure speculation on his part. Mr. Stout, himself, testified he got shot between the eyes the first time; that he was standing erect with his head up and not with his head down. The doctor described the bullet as entering somewhere in the very top of the head, which would be difficult to do if a man is standing erect facing you. Obviously after the first shot was received at some later time the defendant shot him again in the head. Mr. Stout testified that there was no altercation to the point that the defendant was knocked from his feet or the gun was knocked from this hands. He [527.] did not even see Wesley prior to losing consciousness after he was wounded.

As to the defendant's story that he became remorseful which I would submit is rather late in the sequence of events, after he shot Mr. Stout and left the scene, the immediate area there and therefore he did not have anything to do with the killing of Mary Jane Stout, this is inconsistent with the evidence that Mr. Stout heard two male voices talking in a normal tone of voice and in a normal volume and after hearing that conversation between two people I think he described within a minute or less than a minute he heard the four reports that he now believes, and correctly so I submit, to be four gunshots that killed his wife. The only--what reason--the specification alludes to the reason for the killing of Mary Jane Stout being to escape detection and so forth for the previously committed offenses of aggravated robbery and the attempted aggravated murder of Norman Stout.

Let's stop the sequence of events following the shooting and disabling of Norman Stout. What was their situation at that time? We have two young early twenties individuals armed--each armed with a loaded handgun facing a fifty-four year old female person who had been suffering from, I believe they said, influenza, at least she was not in robust health at the moment sitting on a bed in her [528.] bedroom. What possible reason did they have for needing to kill Mary Jane Stout, given those circumstances. Recall, if you will, the testimony of Lt. VanHorn that this defendant was under the mistaken belief at the time he first talked to him in Cannonsburg, Pennsylvania on the 21st day of May at which time he gave his first statement that at that time this defendant was laboring under the misconception that both Mr. and Mrs. Stout were dead. Given that misconception on his part, he gave a statement at that time that he didn't even enter the house. The point of it is that at that moment after Mr. Stout fell--after receiving the second shot, Mr. Stumpf thought he had committed a murder. What other possible, earthly possible explanation for shooting a helpless defenseless lady sitting on a bed in her bedroom four times

other than leave no survivors to identify us. What other possible explanation is there for that merciless, brutal, cold blooded, whatever you want to call it, killing of that fifty-four year old lady as she sat on her bed? Were they fearful she would subdue them with their guns, spotting them some thirty years in age. I think not. The only reasonable possible explanation is to leave no survivors for what we've done, which they believed to be a murder.

So, I would say to your that the aggravating circumstances are glaringly apparent and this Court has [529.] so found in finding the defendant guilty of that amended first specification.

Now then, what mitigating factors have we heard from the defense presentation as set forth in 2929.04 of the Code? Now, I'd like to review briefly, if I might. Whether the victim of the offense induced or facilitated it. I would say that Mary Jane Stout, the only thing she did to facilitate her own death was to become in the line of fire of the bullets fired by this defendant. Unlikely that the offense would have been committed, but for the fact the defendant was under duress, coercion, or strong provocation. The only evidence that this defendant was other than cold and calculating at the time of that killing was his own unsworn statement. What duress was he under? What coercion? The defense would attempt to lead this Court to believe that Wesley had some mystical hold over John David Stumpf, could lead him by the nose to do things that he just wouldn't do otherwise. I don't think there's evidence in this record that supports that. If in fact the defense is arguing that Wesley is the big bad guy because of what happened in Belmont county, then John David Stumpf full well knew at the time that he got out of that car with that gun in his pocket or when he accepted it from Wesley, whichever, to go to the Stout residence that Wesley was a big bad guy and he went along [530.] anyway. There's no evidence of any sort that Wesley turned a gun on

him and said you've got to go, Johnny. I submit to you with that knowledge, voluntarily going to that house armed and sort of leading the proceedings, if you will, at least according to Mr. Stout that he was the one who talked to him initially and asked to use the phone and he also was the one who kept turning to the other who Mr. Stout cannot identify and say, are you ready, are you ready, several times. Is that a leader or is that a follower? They talk about his I.Q., his ability to complete his education. I know of nothing in these mitigating factors as spelled out here that says a person has to be of a certain I.Q. or have completed a certain grade in school with a certain grade point hour to be amendable to the death penalty. In fact, what he says, the offender because of mental disease or defect lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. There's absolutely no evidence whatsoever in this record that that subparagraph applies to this defendant. The next being the youth of the offender. The evidence is, and we aren't disputing that fact, that the defendant was twenty-three years of age at the time he killed Mary Jane Stout. Again, it is a factor to be considered, but is it a weighty factor to the point that the Court can say [531.]that in and of itself coupled with, if you will, the question whether or not there is a significant criminal history outweighs the circumstances proved by the evidence in support of the aggravating circumstances set forth in the amended first specification. I don't believe any reasonable person or that justice can conclude or that justice requires the conclusion that a twenty-three year old person is entitled to commit an aggravated murder under any circumstances, however brutal, however cold blooded and calculatingly it was done and should the first time escape the death penalty. I believe a twenty-three year old individual with the criminal history of this defendant, which is not unblemished record by the way, it is a question for this Court to determine whether or not he has a--there is a, quote, lack of significant criminal history. I submit to you that the

criminal history presented is such that this defendant age twenty-three, if you will, with his history under the circumstances of this case where they invaded the privacy and sanctity of a private home selected at random which could have been anyone whose home seemed to be vulnerable for their purposes methodically, if you will, after having shot Norman Stout in order to get away, if you will, killed Mary Jane Stout is amenable to the death penalty regardless of his age of twenty-three. As to whether or not the [532.] defendant is the principal offender, I don't believe it is necessary for this Court to conclude that he was the principal offender, that is, the actual shooter. I think there is ample evidence--I'm not conceding that at all. I think there's ample evidence in this record that this defendant fired the four shots into the body of Mary Jane Stout. His story does not wash. You take the three versions, the first version he thought no one could identify anybody because both of the Stouts were dead, so he didn't even admit going into the house. The second version after he found out Norman Stout was still alive and could probably or possibly identify him he changed his story to admit that part which he through Norman Stout could point the finger to him, but did his level best to get the chrom colored gun out of his hand by saying there was an altercation with Norman Stout. Five foot six or so and this defendant thirty years younger and somewhat bigger and the third person we believe was Wesley who was described as similar in build to this defendant, Norman Stout shot between the eyes was still able to knock down this defendant and Wesley and gravel around on the floor with the guns rolling around to the point where this defendant grabbed another gun, the back gun he would have you believe, but he said I shot him again. But the ballistics man says both bullets that entered the head of [533.] Norman Stout came from the same gun and was not the black gun so that doesn't wash, but he did his level best to get that gun out of his hand before the shooting of Mary Jane Stout. Said he walked away. There wasn't enough time for two people

were talking that Norman heard and the four shots were fired to get down to the basement as he would have the Court believe and then it is his--in that second statement he would have you believe he said he didn't even hear any gunshots, that he was down in the basement. But in that statement, I believe contrary to what he said in his unsworn statement today, if I'm not mistaken in that second statement he said Wesley after we got in the car, Wesley wanted his black gun back because he had it awhile it had some sentimental value, something to that effect. So they traded the guns back after the shooting and then he pitched the chrome colored gun. that was his second statement. His third statement which I believe was the maybe the 15th of May, yes, State's Exhibit "II-2" which is a summary from Lt. VanHorn of the verbal statement in that statement he said I never did have the chrome gun. I had it inially, but I found out I couldn't operate it, so I told Wesley I didn't know how to operate it so we traded guns. Throughout this whole sequence of events he has the black gun, which is impossible. He admittedly shot Norman Stout and [534.] the [black gun didn't shoot Norman Stout by the ballistics expert and also by Norman Stout, himself. He saw a chrome colored gun similar to the Raven we have in evidence as I think State's Exhibit "N-1". So, the bullets, all the bullets that hit anybody came from the other gun, not the black gun. so, there's ample, ample evidence in this record to make the reasonable inference that this defendant shot both those individuals. But, be that as it may, they both went in for the joint and common purpose of committing and armed robbery. They both actively participated in the events, sequence of events of that armed robbery. both weapons were fired in that house that night. The black gun fired once because it probably misfired thereafter, as evidenced by the bullet that was found in the mattress. Both shooters were trying to kill somebody. Given those circumstances, although we believe the evidence does prove that he was the shooter of Mary Jane Stout legally, technically, I don't believe it makes any difference when you

have two people acting in concert for the joint and unlawful purpose of committing an aggravated robbery and both are attempting to kill somebody with a firearm as a result of or during the course of that armed robbery they are both amenable to the death penalty under that amended specification in my judgment.

I don't wish to belabor the matters further. There [535.] are--Mr. Tingle talks about other mitigating factors. Well, let me back up a moment. The only evidence to support some of the things Mr. Tingle would have you accept as the gospel truth is the unsworn statement of the defendant given here this morning, which is his right to do, but I ask you why the unsworn statement rather than being sworn to testify as every other witness? To avoid cross-examination. I had quite a few questions I would have liked to ask Mr. Stumpf about some of these things he's saying in his statement and some of the things he's saying in his statement and some of the things he's saying now in his unsworn statement, assuming he would have testified under oath in a similar manner. Why did he elect not to submit himself to cross-examination? How much weight should this Court give the unsworn statement of the defendant which was not subjected to the test of cross-examination? The Court is weli able to consider that.in determining what credibility to give the unsworn statement of the defendant.

In summary or in conclusion, if you will, perhaps the defense has shown that this defendant is a youth that is the youth of the defendant was shown to be twenty-three years of age and that he does not have, as Mr. Tingle says, a string of armed robberies or other homicides. He has some record, whether that is a lack of significant criminal history or not to the point that it carries much weight [536.] one way or the other is for this Court to determine, but I submit to you that given the circumstances of this killing particularly as it relates to the factual allegations of the first specification as

amended to the first count of Aggravated Murder it falls far short of outweighing the brutality, the outrageous, if you will, conduct in the killing of Mary Jane Stout, a defenseless, helpless woman after her husband went down with two bullets in the sanctity of her own home sitting on a bed in her bedroom shot four times. I submit to you it falls far short of outweighing those circumstances as revealed by the evidence in which this Court has found beyond a reasonable doubt.

I submit to you the death penalty is the appropriate penalty in this case and the State urges this Court to so find and to so impose the death penalty. Thank you.

JUDGE HENDERSON: Mr. Tingle?

MR. TINGLE: Thank you, Your Honor. Very briefly. Anyone with any sensibility must agree that what occurred at the Stout residence that night was a horrible act. It involves a sense of outrage. There's no question concerning that and not amount of words can give the Stouts any understanding of why. Mr. Scott asked the question why, also, why the death of Mrs. Stout in that situation. We have only to look forty miles down the road in Belmont County, Ohio to get the answer to that and that's the [537.] unexplainable shooting of another individual for absolutely no reason at all at the hands of Clyde Daniel Wesley. It's not a sufficient answer. It's an answer to the question, why, and it's the character of Clyde Daniel Wesley. It is absolutely not the character of John David Stumpf, a person who's incapable of that kind of act. It is a factor to be considered by this Court in mitigating against the imposition of the death penalty. The death penalty is an absolute penalty that is not proper in any situation in which any individual is not absolutely responsible and it is our feeling that that individual who still sits in Texas is the one who shot Mary Jane Stout. Whether this was a joint effort or not the death penalty is available to this Court, whether it finds John

Stumpf to be the principal. Again, we're pointing only for purposes of mitigation. But once again, for such an absolute penalty it should be reserved for someone who's absolutely responsible and with that in mind we urge the Court to consider the penalty that I previously outlined to the Court of life imprisonment thank you.

JUDGE HENDERSON: Thank you gentlemen for your presentation. This trial has run its course. We have had the evidentiary hearing, concluded that and made our decision. We now have concluded the mitigating phase of the hearing and we are about to make our decision upon that. [538.] The Court is going to stand in recess and will advise counsel at the time that the Court will again reconvene.

JUDGE BETTIS: I want to make a statement in the record, if I may Judge.

JUDGE HENDERSON: Certainly. Absolutely. You too, Judge Rice.

JUDGE BETTIS: As the record has indicated, I am not a resident of this county, but I want the record to show that in my thirty plus years of experience both down on the floor and on the bench that I have very rarely witnessed the professional conduct of the lawyers in this case. It's a particular privilege to work with lawyers of this caliber, both for the State and for the defense. They have handled themselves in a professional manner. they have performed their duties as I understand the law to be, a search for the truth, and I appreciate the way they have handled this case. I want the record to so show.

JUDGE HENDERSON: Judge Rice, do you have something you wish to add?

JUDGE RICE: I would want to affirm what the Judge on the other end of this bench has just stated. But in addition I want to commend the Presiding Judge. I couldn't perform the job like he did and I probably had more experience as a Judge than what he has in a dignified--I [539.] want the right word here, precise manner presented the matters that have come before this Court and in the interest of justice. I think has performed a magnificent job. Thank you.

JUDGE HENDERSON: At this time I would simply say that I would add my words to the words of Judge Bettis and Judge Rich with regard to the professional manner in which counsel for both the State of Ohio and the defendant have presented their case. They've worked hard. They've spent hours, hours that those of you who are in this courtroom would not understand in the faithful performance of their duty. I want to take this opportunity to thank the Judges who sit to my left and to my right for their cooperation and their understanding and their invaluable assistance and we now stand in recess until the Court reconvenes later this date.

(Whereupon, at 11:30 o'clock a.m. Court recessed.)

(Whereupon, at 3:12 o'clock p.m. Court reconvened and the following proceedings were had before the Court.)

JUDGE HENDERSON: The Court has been involved in deliberations since leaving the courtroom this morning and you have been assembled here for the purpose of [540.] informing you of the progress of our deliberations. The deliberations are continuing. Decision has not been reached. This Court will reconvene at 10:00 o'clock a.m. Monday morning at which time we anticipate that the decision of the Court may be announced. I would ask at this time have counsel any questions? Mr. Scott?

MR. SCOTT: No, Your Honor.

MR. TINGLE: No, Your Honor.

JUDGE HENDERSON: Is there anything further? Then we stand adjourned until Monday morning.

(Whereupon, at 3:15 o'clock p.m. Court recessed to reconvene at 10:00 o'clock a.m. on September 24, 1984.)

[541.] (Whereupon, at 10:01 o'clock a.m., September 24, 1984, the following proceedings were had before the Court.)

JUDGE HENDERSON: This is case number 9684. The title of the case is State of Ohio versus John David Stumpf. The Judges of this Court, Judge Warren Bettis, Judge Raymond Rice and I'm John E. Henderson. Judge Bettis and Judge Rice have been assigned to this case by the Supreme Court of Ohio. It is a three Judge panel as provided by law. The Court notes that counsel for the State of Ohio is present in court and counsel for the defendant and the defendant is present in court. As indicated by the Court, this time has been set aside for the imposition of sentence as prescribed by law both as to count one and as to count two of the Indictment. I would ask at this time that the doors be secured and that no one be allowed to enter until the sentencing procedure is completed.

First as to Count 2 and the specification of the Count, Count 2 being the offense of Attempted Aggravated Murder, a felony of the first degree in violation of Section 2923.029(A) and the specification.

Has counsel for the State of Ohio anything that they desire to place in the record before sentence is [542.] pronounced on Count 2?

MR. SCOTT: No, Your Honor.

JUDGE HENDERSON: Has counsel for the defense anything they wish to place in the record before sentence is pronounced on Count 2?

MR. TINGLE: No, Your Honor.

JUDGE HENDERSON: Will counsel for the defense and the defendant please stand? John David Stumpf, do you wish to make a statement in your own behalf or present any information in mitigation of punishment?

THE DEFENDANT: (Defendant nodded in the negative.)

JUDGE HENDERSON: I note that you indicated by shaking in the negative to the question, is that correct counsel for the defendant?

MR. STEPHENS: That's correct, Your Honor.

JUDGE HENDERSON: The defendant having withdrawn his plea of not guilty to the Second count of the Indictment and to the specification and having entered his plea of guilty to said Count entitled Attempted Aggravated Murder in violation of Section 2923.02 (A), a felony in the first degree and to the firearms specification prescribed by Section 2929.71 to said Second Count and the Court having found the defendant to be guilty of said offenses and specifications, the Court hereby sentences the defendant to the Columbus Correctional Facility and there to serve [543.] an indeterminate sentence of not less than 7 years and not

more than 25 years. No fine is imposed against the defendant, but all costs are assessed against him for which execution is awarded.

In addition thereto for violation of the firearms specification you are sentenced to said facility for a mandatory period of 3 years, which said 3 years is, in accordance to law, is to be to be served prior to the sentence heretofore imposed for said Second Count.

The defendant and his counsel may be seated. Is there anything further, gentlemen of counsel, with regard to Count 2

MR. SCOTT: State has nothing, Your Honor.

MR. STEPHENS: Nothing, Your Honor.

JUDGE HENDERSON: Now, as to Count 1 and specification 1, as amended, and specification 4. The Court at the conclusion of the hearing provided by Section 2929.03 (D) deliberated, prepared its separate Opinion, as provided by Section 292.03 (F), and does unanimously find that the aggravating circumstances of the defendant John David Stumpf was found guilty of committing outweighed the mitigating factors presented by the defendant at said hearing.

The Court will now state its separate Opinion. Pursuant to Section 2929.03 (F) of the Revised Code [544.] of Ohio, the Court being a panel of three Judges does hereby state in a separate Opinion as follows:

Existence of any mitigating factors set forth in division B of Section 2929.04.

The Court has considered in accordance with Revised Code of Ohio, Section 2929.04 the following mitigating factors:

1. The nature and circumstances of the offense.

2. The history, character and background of the offender, for which you may see Defendant's Mitigation Exhibit number "4".

We find that the defendant has established by a preponderance of the evidence the following mitigating factors:

1. The youth of the offender - age 23.

2. That although the defendant had been found guilty of certain offenses in his home community, the defendant lacked significant history of prior criminal conviction and delinquency adjudications.

We further find that the defendant has not established by a preponderance of the evidence mitigating facgtors 1, 2, 3 and 6 as set forth in Section 2929.04 (B).

Existence of any other mitigating factors.

The defendant presented the following factors which the Court has considered:

[545.]
Evidence of character.
Use of alcohol and drugs.
Employment history.
Emotional stability.
Family relationships.

Educational background and native intelligence, and you're referred to Defendant's Mitigation Exhibit number "3".

Unverified and unattested questionnaires on John David Stumpf. These are found in Defendant's Mitigation Exhibit number "6". The alleged preparer's name appears in response to question number 30.with no indication it is or is intended as a signature. The questionnaires were prepared by person or person unknown.

Summary results of questionnaires. These are contained in Defendant's Mitigation number "5".

And finally, leadership qualities.

Factors 1 through 9 were not established as mitigating factors by a preponderance of the evidence.

Aggravating circumstances the defendant was found guilty of committing.

The offense was committed for the purpose of escaping detection, apprehension, trial or punishment of other offenses committed by the defendant, to wit: Aggravated Robbery and Attempted Aggravated Murder.

[546.] Reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors:

The Court finds beyond a reasonable doubt that the defendant was the principal offender in County One of the Indictment.

2. The methodical manner in which the defendant and his companion entered the house of the victims and assumed control of the victims. For example:

'Wiping of fingerprints from the telephone.

b. The dialogue of the defendant with his companion. For which you may see attached Transcript A.

c. The initiative taken by the defendant in the course of that dialogue leading up to and directing the victims into the bedroom.

d. Continual holdings both victims at gunpoint by the defendant.

e. The defendant shooting the male victim at close range between the eyes.

The defendant firing a second shot into the head of the male victim.

The defendant and his companion engaging in dialogue in the proximity of the male victim followed by four shots, the bullets of which were found in the head and body of Mary Jane Stout.

[547.] 3. Failure of the defendant and his companion to render assistance to the victims.

4. Defendant and his companion fleeing immediately from the scene with the victims' automobile and personal property including firearms and ammunition.

5. The defendant actively participated in the sale of guns stolen from the home of the victims.

6. The course of conduct of the defendant both before and after the commission of the offense in the travel through the country with a quantity of beer and guns.

7. The defendant's companion firing a gun into a posing vehicle en route.

8. The defendant made no effort to disassociate himself from his companions.

9. The direct evidence of a gang operation of robbery, assault and other crimes.

And this Opinion is signed by the three Judges of this Court.

Have counsel for the State of Ohio anything they wish to place in the record before sentence is pronounced?

MR. SCOTT: No, Your Honor.

JUDGE HENDERSON: Have counsel for the defendant anything they wish to place in the record before sentence is pronounced?

MR. STEPHENS: No, Your Honor.

[548.] JUDGE HENDERSON: Will the defendant and his counsel please stand?

Does the defendant John David Stumpf wish to make any statement in his own behalf or present any information in mitigation of his punishment? Mr. Stumpf?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: The defendant having heretofore withdrawn his pleas of not guilty to Count 1 and specification 1, as amended, and specification 4 of said Count 1 and having entered a plea of guilty to said Count 1 and specification 1, as amended, and specification 4 of said Count 1 in violation of Section 2903.01 (B) entitled Aggravated Murder and specification 1, being in violation of Section 2929.04 (A) (3) and specification 4, being prescribed by Section 2929.71 and having been found by this Court guilty of said Count 1 and specification 1, as amended, and Count 4--or and Specification 4, and the Court having unanimously found beyond a reasonable doubt that the aggravating circumstances the defendant John David Stumpf was found guilty of committing outweigh the mitigating factors presented by the defendant; the court also considered the argument of counsel, the statement of the defendant and the presentence of investigation. Therefore, this court orders a Writ of Execution of the death penalty be issued, directed to the Sheriff of [549.] Guernsey County, Ohio. The Sheriff shall convey John David Stumpf within 30 days in a private manner to Columbus Correctional Facility where the defendant will be delivered to the Warden. The Warden shall keep the defendant in custody until January 10, 1984, at which time the sentence of the Court will be carried out in accordance with Section 2949.22 o the Revised Code of Ohio.

The Court having found you guilty of the firearms specification 4 prescribed by Section 2929.71 and having sentenced you to 3 years actual incarceration upon the specification Count 2, the Court finds that the felonies of Count 1 and County 2 were committed as a art of the same act or transaction and only one 3 year term of actual incarceration is being imposed. The sentence imposed for violation of Count 2 will be served consecutively with the sentence imposed for violation of County 1 and specification 1.

This being a capital case with the death penalty involved, Mr. Stumpf, you are advised that a review of the sentence of death by the Court of Appeals and by the Supreme court of Ohio will be conducted upon the appeal at the same time as the other issues are reviewed.

Now, as required by Criminal Rule 32, I wish to advise the defendant that he has the right to appeal. That if he [550.] is unable to ay the cost of an appeal, he has the right to appeal without payment. If he is unable to obtain counsel for an appeal, counsel will be appointed without cost. If he is unable to pay the cost of documents necessary to an appeal, such documents will be provided without costs and he has the right to have a notice of appeal timely filed on his behalf.

Upon defendant's request the Court shall forthwith appoint counsel for the appeal.

Mr. Stumpf, is it your desire that the Court at this time appoint counsel for your appeal?

MR. STEPHENS: It is, Your Honor.

JUDGE HENDERSON: Mr. Stumpf, is it your desire to have Mr. Tingle and Mr. Stephens appointed as your counsel for the purpose of appeal?

THE DEFENDANT: Yes.

MR. STEPHENS: Your Honor, at this time I believe it would be, after I consult with him, the client's desire to have the State Public Defenders Office appointed to represent him on the appeal, your appellate district.

JUDGE HENDERSON: The Court is going to appoint Mr. Tingle and Mr. Stephens as your attorneys.

MR. STEPHENS: Fine, Your Honor.

JUDGE HENDERSON: In Compliance with Revised Code Section 2929.03 (F) the Court will file a written Opinion [551.] required to be prepared by it with the Clerk of the Fifth District of the Court of Appeals and with the Clerk of the Supreme Court of Ohio within fifteen days.

Gentlemen, you may be seated. Is there anything further from the counsel for the State of Ohio?

MR. SCOTT: Nothing, Your Honor.

JUDGE HENDERSON: Anything further from counsel for the defendant?

MR. TINGLE: No, Your Honor.

MR. STEPHENS: Nothing, Your Honor.

JUDGE HENDERSON: I believe that the record is already clear that certain documents have been nolled, is that correct, Mr. Scott?

MR. SCOTT: That is correct, Your Honor. We are in the process of preparing the entry.

JUDGE HENDERSON: Judge Rice have you anything further?

JUDGE RICE: Nothing further.

JUDGE HENDERSON: Judge Bettis?

JUDGE BETTIS: No.

JUDGE HENDERSON: Then this Court stands adjourned.

(Whereupon, at 10:20 o'clock a.m. the foregoing proceedings were terminated.

* * *

IN THE COURT OF COMMON PLEAS
IN AND FOR THE FIFTH DISTRICT
COURT OF APPEALS, GUERNSEY
COUNTY, OHIO

CASE NO. 9684

STATE OF OHIO,

Appellee,

vs.

JOHN DAVID STUMPF,

Appellant.

Transcript of Trial Proceedings held on Tuesday, October 1, 1985 before the Honorable John E. Henderson, Judge, and the Honorable J. Warren Bettis.

APPEARANCES:

JAMES R. SCOTT
C. KEITH PLUMMER
Prosecuting Attorneys
139 W. 8th St.
Cambridge, OH

For the Appellee,

CRAIG M. STEPHENS
LEWIS M. TINGLE
Attorneys at Law
122 E. 8th St.
Cambridge, OH

For the Appellant.

[illegible]

* * *

[13]

* * *

MR. TINGLE: If the Court please, the motion which has been filed on behalf of the defendant requests in the alternative the withdrawal or leave to withdraw the plea of "guilty" previously entered by the defendant and in the alternative for a new hearing to be conducted concerning the penalty to be imposed against this defendant. In support of that motion, I believe the State of Ohio, the Prosecuting Attorney, will agree to a stipulation that the testimony adduced at the trial of Clyde Daniel Wesley by or from one James Eastman, Case #9692, and also the testimony of Clyde Daniel Wesley in that same case can be admitted for consideration of the Court as it relates to the motion filed by the defendant as the testimony in the entirety of both witnesses.

[14] MR. SCOTT: Upon the representation of the Court Reporter that what Mr. Tingle has is, in fact, the entire testimony of Mr. Wesley and the entire testimony of the witness Eastman, I'll agree that it be stipulated that that is what it is and nothing more rather than bringing the Court Reporter to the stand and doing all those things. If she indicates to us that that is the complete transcript of those two people, I have no problem in putting it in.

JUDGE HENDERSON: Do I understand the stipulation is that the testimony of these two individuals, Clyde Daniel Wesley and Mr. Eastman, that may be received in evidence in this manner?

MR. SCOTT: As to that's what it is and nothing more, that that was the testimony as given in the Wesley case.

JUDGE HENDERSON: Very well.

MR. TINGLE: On that basis, I would offer Defendant's Exhibit "2" and "3" then.

JUDGE HENDERSON: And on that basis, those are admitted, "2" and "3".

MR. TINGLE: If the Court please, in support of the notion then that is the only testimony or physical evidence which will be offered in support of the motion. I would like to address the Court on [15] the issue itself.

JUDGE HENDERSON: Very well.

MR. TINGLE: If the Court please, the basis upon which the motion is filed or brought to the Court's attention is the fact that at the time of sentencing, this Court, as required by law, issued a written finding; and part of that finding was or were the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The first of those items listed under number 1 that the Court finds beyond a reasonable doubt that the defendant was the principal offender in Count 1 of the indictment. The State of Ohio during the trial of Clyde Daniel Wesley, Case #9692, produced a witness by the name of James Eastman. To summarize briefly, Mr. Eastman had been a cell mate of Clyde Daniel Wesley while he was incarcerated in the Guernsey County Jail following his extradition from the State of Texas. It was the testimony of Mr. Eastman that during the course of their companionship in that cell, Mr. Wesley related to him the story of this crime and how it

occurred. The testimony of Mr. Eastman, found on page 12 of that transcript of his testimony, [16] does indicate, and he stated directly, that as they were getting ready to leave, Wesley related to him he heard her moan, meaning Mrs. Stout, or cry out something, turned around and shot her again. Wesley said he went hack and shot Mrs. Stout again. Put into the context of the entire testimony, the shooting of Mrs. Stout as related by Mr. Eastman, James Eastman, occurred in two phases. She was shot, they left the room, as they were leaving they heard her moan, she was shot again. Comparing that to the testimony of Clyde Daniel Wesley as offered at trial, that scenario is followed fairly closely. But when questioned about how James Eastman could have known these things or where he got his information, Mr. Wesley's explanation was that during the course of their companionship in that jail cell, he had a transcript of the case of "State versus John Stumpf" to use in his own trial preparation, that he discussed the case somewhat with Mr. Eastman and Mr. Eastman had access to that transcript and read the account in the transcript; thereby acquiring the knowledge [17] that he testified to. The problem with Wesley's explanation is the fact that there is no account that matches that situation or that scenario in the transcript of John David Stumpf. There is no account which states Mrs. Stout was shot, they left the room, heard her moan, went back and shot her again. The only place that that appears is in the case of Clyde Daniel Wesley. It would have been impossible for Mr. Eastman to have acquired that knowledge from the transcript of John David Stumpf. It, therefore, follows that he must have acquired that knowledge from Clyde Daniel Wesley personally.

On that basis, it does indicate that the Court's finding that the defendant, John Stumpf, was the principal offender. In other words, the one who shot Mary Jane Stout is contradicted by the testimony of James Eastman, and the explanation of Clyde Daniel Wesley is not sufficient to

contradict James Eastman's testimony. It's on that basis, then that we have filed this motion, brought it to the Court's attention, asking for the alternate forms of relief. Thank you.

JUDGE BETTIS: Well, you were counsel for Mr. Stumpf, and I'm sure he pled "guilty", and I'm sure you reviewed [18] the details of his plea with him many, many times. Both of you are very competent counsel, I heard you. At least, that's my view. Didn't you, Lew?

MR. TINGLE: Yes.

JUDGE BETTIS: How many hours did you spend with Mr. Stumpf in discussing the case with him before you pled him guilty?

MR. TINGLE: Quite a few, Your Honor. Accurately, I couldn't tell you, it was a substantial number.

JUDGE SETTIS: All right, thank you.

JUDGE HENDERSON: Mr. Scott.

MR. SCOTT: If the Court: please, I believe we need to talk about two other things before we get to the substance of what Eastman had to say and what Wesley had to say. Initially, I think we need to look at Section 2945.36 which talks about a three judge panel in a death penalty case and what procedurally is necessary. As I mentioned earlier, the statute says that this Court can determine matters of law and fact by a majority decision. However, decisions regarding the guilt, or in this case, the imposition of the death penalty, must be unanimous. With that in mind, I think we need to look at what the defendant is asking by means of this motion. Initially, the defendant is asking for a withdrawal [19] of the previous plea of "guilty". It seems to me that is a matter of law and does not go to the question of the imposition of the

death penalty nor to the question of guilt. And that can be initially, I believe, determined by the remaining two judges in this panel, being a majority of the original panel. As far as the merits of that motion, there is no indication as the Court has inquired that Mr. Stumpf was not fully aware of what he was doing when he entered the plea of "guilty". It was, if you'll recall, a negotiated plea wherein he entered a plea of "guilty" to certain counts and to certain specifications to those counts in return for the State dismissing certain other counts or certain other specificat[illegible]. I believe in our memorandum in opposition to the motion we cite the provision of Criminal Rule (3[illegible] which states that a motion to withdraw a "guilty plea is directed to the sound discretion of the Court. And I'll quote, "A motion to withdraw a plea of "guilty" or "no contest" may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the Court, after sentence, may set aside the judgment of conviction and permit [20] the defendant to withdraw his plea". We cite a case or two in here which indicates that if the defendant knew what he was doing and in the absence of coercion or mistake or something of that nature which casts doubt on the voluntariness of it or whatever, the motion should be denied. We heard nothing from the defense in this case in support of this motion to indicate that the defendant was anything than fully informed and that he intelligently made the decision with the assistance of his counsel after having everything explained to him that pertains to this plea of "guilty" and that he agreed and that the "guilty" plea proceedings were, in fact, undertaken and the inquiries of the Court made at that time, which I believe is all a matter of record in this case.

So, therefore, I think that the initial motion by the defendant to withdraw the "guilty" plea should be denied because there's been nothing shown to the Court to justify doing anything else.

With regard to the other alternative relief requested by the motion, it is tantamount to a motion for a new trial, at least in part, with regard to the sentencing phase of the former trial. The Court, having following the plea of "guilty", [21] heard the evidence and found the defendant "guilty" of the offense, guilty of the specifications by unanimous decision of the three judge panel. There is no reason to disturb that finding because of the fact that this is not a case where the trial proceeded on a "not guilty" plea; but the defendant admitted in open Court, as we cite in our memorandum, that there is nothing more solemn or whatever than a plea of "guilty" where he admitted that he did, in fact, purposely kill Mary Jane Stout and pleaded "guilty" to certain of those specification. It seems to me that in order to determine this part of the motion, the State would take the position that the remaining two judges can handle that as well because it is not a matter at this point directly dealing with the imposition of the death penalty nor is it a matter dealing with guilt, the finding of guilt. It is a question or a request to vacate the former sentence which would be a matter of law, arguably at least. The is very little, if any, authority that I could find on this exact problem where we don't have an intact panel left, but it would be our position that the two remaining judges can make that decis[illegible] because it is a matter of law. And whether or no[illegible] [22] the Court feels that the presence of the witness Eastman is necessary in order to do that or whether the Court can read the record and determine from the record of his, testimony in the Wesley case, is a matter for the Court to determine. I would hasten to go on and say that although the Court did in it's unanimous opinion setting forth the reasons why the aggravating circumstances outweighed the mitigating circumstances shown, did make a finding that the defendant, Stumpf, was the principal offender in the case, that finding was not necessary under the specifications to which the defendant entered his plea. That even if the Court found that the defendant was an aider and abettor or even if the evidence

showed that the defendant was an aider and abettor under those specifications, the death penalty still can be imposed. The question really before the Court is whether or not the information provided now to the Court would change the Court's finding because the evidence is in conflict on the point; that is, that Mr. Wesley testified at his own trial, and the Court has that testimony that he did not fire the fatal shot. Eastman's testimony was as to a conversation with Wesley which occurred long after the Stumpf trial [23] had been concluded. The circumstantial evidence, the ballistics evidence certainly supports the Court's original finding that Stumpf was the--in effect, the shooter or the principal offender.

Now, it would seem to me the Court's first determination would be as to whether or not this new information, being the testimony of Wesley and the testimony of Eastman, is sufficient to change the Court's opinion as to whether or not the evidence still showed or did not show that Stumpf was the principal offender. And if the Court should then conclude that the evidence now, the newly discovered evidence if you will, does change the picture to the point where that finding is not proper, whether or not that makes any difference; nevertheless, on the imposition of the death penalty--

JUDGE BETTIS: Of course Mr. Scott, pardon me for interrupting, but if we had not, been satisfied that Stumpf was, in fact, the trigger man, the principal offender, and we were satisfied that he was, in fact, an aider and abettor, that may very well have had an effect upon this Court's determination of whether the death penalty should follow. I'm not saying it would, but it's possible.

[24] MR. SCOTT: That's right. I think the first decision this Court would have to make is whether or not this additional information changes the picture as to that finding that was

previously made. And if it does, does that, in turn, change the appropriateness of the death penalty in this case in the judgment of the Court?

JUDGE BETTIS: Let me follow that up. My recollection was that Wesley was in jail in Texas at the time of the Stumpf trial.

MR. SCOTT: That's correct, sir.

JUDGE BETTIS: You were aware of that, were you not, Mr. Scott?

MR. SCOTT: Yes, I knew of that.

JUDGE BETTIS: And you were aware of it too?

MR. SCOTT: Everybody was aware of it.

JUDGE BETTIS: There wasn't anything to prevent either the State or the defense from talking to Mr. Wesley. Now, as a practical matter, he probably wasn't going to have very much to say to anybody; but you didn't ask him, did you?

MR. TINGLE: The defense did not, no, Your Honor.

JUDGE BETTIS: Or anyone on behalf of the defense. He was never asked by anybody, so he was available?

MR. SCOTT: I believe that's correct, yes, Your Honor.

JUDGE BETTIS: We knew he was in Texas, defense knew that.

[25] MR. TINGLE: He was fighting extradition. Though, as far as availability for trial, he was not available.

JUDGE BETTIS: You and I know as a practical matter he probably wasn't going to give you the time of day if you went down. But the point is, you never asked him what he did in relation to Mrs. Stout or anybody else, did you?

MR. TINGLE: I think the prosecution was in Texas at that time during the period he was fighting extradition. What transpired between them and Wesley and Wesley's counsel in Texas I'm not privy to.

JUDGE BETTIS: Okay, but you didn't.

MR. SCOTT: I can tell you, but there's no record on it.

JUDGE BETTIS: Let me follow up. No one for the defense asked Mr. Wesley; and at least at this point, all we have is verbiage, it's not evidence. We have verbiage, we have a statement by Mr. Tingle that this is what Wesley would do, and we have a letter allegedly signed by Mr. Stout. So is there any evidence from anybody?

MR. SCOTT: I have nothing to present, Your Honor.

JUDGE BETTIS: In the record so far that, in fact, Wesley was the trigger man.

MR. TINGLE: Eastman's testimony, Your Honor. At Wesley's trial.

[26] JUDGE BETTIS: Okay. And isn't there some--- don't we have some right to read that and determine whether that is, in fact, credible testimony?

MR. TINGLE: Very definitely, Your Honor.

JUDGE BETTIS: I haven't read it. I'm certainly going to take the privilege to do so.

MR. TINGLE: And compared also against Wesley's testimony.

JUDGE BETTIS: I'm going to read both Eastman and Wesley because I didn't have the privilege of hearing that testimony.

MR. SCOTT: If it's appropriate, I can tell you what happened in Texas when I talked to his Texas lawyer.

JUDGE HENDERSON: I don't believe that's necessary at this time. We're hearing the matter of Eastman at this time, and we're not hearing the motion which has not been made yet.

MR. SCOTT: The inquiry was made, and I have an answer. But if you don't want to hear it at this point, that's fine.

JUDGE BETTIS: It's a motion of the defendant, not the State.

MR. SCOTT: But I have nothing other to say than it seems to me I don't presume to advise this Court how to proceed. We are under a set of circumstances, which to my knowledge, has not occurred under our present set-up with regard to capital cases. It [27] seems to me the Court must first look at what you have on the record there that was presented today to determine if you can determine from that alone whether or not Eastman's testimony is of sufficient credibility to warrant further consideration or whether you need to hear testimony from Eastman live. It seems to me that's the first thing you need to consider and once you have made that determination as to whether or not a new trial is

warranted on the basis of that evidence. I believe that this Court procedurally--this Court can proceed with the two remaining members of the panel because we are not dealing directly with the imposition of the death penalty nor directly with the adjudication of guilt. We are dealing with a matter of law as to whether or not the previously imposed sentence shall be vacated. Thank you.

JUDGE HENDERSON: Anything further, Mr. Tingle?

MR. TINGLE: Nothing further, Your Honor.

JUDGE HENDERSON: We'll take this matter under advisement. The Court is going to, so that they don't get lost, is going to present two items: the letter from Mr. Damiani, Supreme Court, which I think all counsel have received a copy and also the judgment entry of the [28] Court of Appeals which remands this case, if necessary. I believe it says for the purpose of the determination of any and all motions now, parenthesis, then pending before it. Those two matters, I believe, we'll just have them put into the record.

Anything further? We'll take this matter under advisement.

(Whereupon, at 3:17 o'clock p.m. the foregoing proceedings were terminated.)

* * *

[Transcript of State's opening statement, R. 33,Transcript of Wesley Trial, April–May 1985]

* * *

[1658] help you follow the evidence as it is presented. I'm going to call on the prosecutor or the assistant prosecutor at this time. I believe, is it Mr. Scott who's going to make the opening statement?

MR. SCOTT: That's correct, Your Honor.

THE COURT: For the State of Ohio, Mr. Scott.

MR. SCOTT: Thank you, Your Honor. May it please the Court, Gentlemen of counsel, Ladies and Gentlemen of the Jury, you have now at long last after many days been seated and sworn as the Jury which will hear and decide this case. Before we begin with the actual presentation of testimony and evidence in this case, both Mr. Brown or Mr. Raptis on behalf of the defendant and myself are given the opportunity to address the Jury in what is referred to as opening statements. Now, although we have mentioned from time to time over the last eight days or so in the selection of a Jury briefly the facts of this case and the events that took place on May 14, 1984 at the Stout residence, this is really the first opportunity we've had to tell you what this case is all about and the facts which we believe will be revealed by the evidence as it's presented. Now, the purpose of opening statements is to enable us to tell you in advance, to give you some sort of [1659] a bird's-eye view, if you will, of the factual events and situations presented in this case. It is hoped that by means of these opening statements the bits and pieces of testimony which you will hear from the witness stand, from the various witnesses, will be more meaningful for you, and you'll be able to fit those bits and pieces, the jigsaw puzzle, if you will, over into the over-all factual

picture involved in this case. As has been mentioned a time or two, what we say on opening statements are not evidence. The only---likewise, at the Stout residence are not evidence. Both the opening statements and the view are designed to assist you in understanding the evidence as it's presented from the witness stand.

On June 14, 1984 Grand Jury of this county returned an indictment against this defendant charging Clyde Daniel Wesley with committing five separate offenses all on May the 14th of last year in the shooting incidents at the Stout residence. Once again, the indictment is not evidence, the indictment is merely the formal accusation of crime made against this defendant. It is nothing more than the procedural means by which this matter comes [1660] before this Court for trial. It informs---as has been mentioned, it informs the defendant of the nature of the charges against him precisely, and it also determines precisely what the State of Ohio is required to prove beyond a reasonable doubt in order for the Jury to properly find the defendant guilty of these offenses.

Let's review briefly the five charges. The first count in the indictment charges the crime of aggravated murder in violation of Section 2903.01(B) of the Oho Revised Code resulting in the death of Mrs. Stout. The first count also contains four specifications. The first three specifications, (1) (2), and (3), set forth aggravating circumstances involved in this killing which are referred to as sometimes the death penalty specification we talked about. The fourth specification charges that the defendant had a firearm on his person when he committed the offense, and this has nothing to do with the death penalty. The second count charges attempted aggravated murder in violation of Ohio Revised Code, Section 2923.02(A), resulting from the wounding---the gun shot wounding of Norman Stout. This second count also has what's referred to as a gun specification. That is, that the defendant had [1661] a firearm on or about his person at the

time he committed that offense. The third count is the offense of aggravated robbery in violation of Section 2911.01 of the Code and involves the stealing of property while armed with a deadly weapon. Again, a gun specification to the aggravated robbery count that the defendant had a firearm, that the deadly weapon involved was a firearm, which he had on or about his person at the time he committed the offense. The fourth count is a grand theft of a motor vehicle charge under Section 2913.02. It is the actual stealing of a motor vehicle from the Stout residence. The fifth count is grand theft of a firearm under the same Section, 2913.02, that the actual stealing of a handgun from the Stout residence. There are no specifications to the fourth and fifth counts.

Now, these are the five precise crimes with which the defendant stands charged in the indictment and which the State will prove beyond a reasonable doubt. The indictment has been mentioned a number of times at this time I'd like to read the essential allegations in the indictment:

Count one: "The jurors of the Grand Jury of the State of Ohio within and for the body of the [1662] county aforesaid, that is, Guernsey County, on their oaths in the name and by the authority of the State of Ohio, do find and present that Clyde Daniel Wesley, Lake Tawakoni, Texas, on or about the 24th day of may, 1984, at the County of Guernsey, aforesaid, did personally cause the death of another person to wit, Mary Jane Stout, while committing or attempting to commit or while fleeing immediately after committing or attempting to commit the offense of aggravated robbery, in violation of Ohio Revised Code, Section 2903.01(B) entitled Aggravated Murder, and contrary to the statute in such case made and provided against the peace and dignity of the State of Ohio." Specification one to the first count: "The Grand Jurors further find and specify under Ohio Revised Code, Section

2924.049(A)(3), and in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the above named Clyde Daniel Wesley to wit, aggravated robbery." Specification two to the first count: "The Grand Jurors further find and specify under Ohio Revised Code, Section 2929.04 (A) (5), and in [1663] compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense at bar was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons to wit: Mary Jane Stout and Norman Stout." Specification three to the first count: "The Grand Jurors further find and specify under Ohio Revised Code Section 2929.04 (A) (7), and in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense was committed while the above named, Clyde Daniel Wesley, was committing or attempting to commit or fleeing immediately after committing or attempting to commit the offense of aggravated robbery and further that the above named, Clyde Daniel Wesley, was the principal offender in the commission of the offense of aggravated murder as charged in the first count." Specification four to the first count: "The Grand Jurors further find and specify and in compliance with Ohio Revised Code, Section 2941.141, that the above named, Clyde Daniel Wesley, had a firearm on or about his person or under his control while committing the aforesaid offense. That is, the first count of aggravated murder with the four specifications." Count two: "The jurors of the Grand Jury [1664] of the State of Ohio within and for the body of the County aforesaid, on their oaths in the name and by the authority of the State of Ohio, do find and present that Clyde Daniel Wesley, Lake Tawakoni, Texas, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did purposely engage in conduct which if successful, would have constituted the offense of aggravated murder by then and there purposely attempting to cause the death of another

person, to wit: Norman B. Stout, while committing or attempting to commit or while fleeing immediately after committing or attempting to commit the offense of aggravated robbery, all being in violation of Ohio Revised Code, Section 2923.02 (A), entitled Attempted Aggravated Murder, and contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio." Specification to the second, it's the same as specification four to the first count, that he had a firearm on or about his person. The third count: "The Jurors of the Grand Jury of the State of Ohio within and four the body of the County aforesaid on their oaths, in the name and by the authority of the State of Ohio, do find and present that [1665] Clyde Daniel Wesley, Lake Tawakoni, Texas, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, in attempting or committing a theft offense as defined in Ohio Revised Code, Section 2913.01 to wit, the offense of Grand Theft of property of one Norman B. Stout and one Mary Jane Stout, or in fleeing immediately after such attempt or offense did then and there have a deadly weapon to wit; a firearm on or about his person or under his control." Armed robbery. Armed robbery is what we're talking about "in violation of Ohio Revised Code, Section 2911.01, entitled "Aggravated Robbery" and contrary to the form of the statute in such case made and provided against the peach and dignity of the State of Ohio." Again, that he was armed with a firearm, it's a specification to that third count. Count four: "The Jurors of the Grand Jury of the State of Ohio within and for the body of the County aforesaid on their oaths in the name and by the authority of the State of Ohio, do find and present Clyde Daniel Wesley, Lake Tawakoni, Texas, on or about the 14th day of May, 1984, at the County of Guernsey, aforesaid, did with purpose to deprive the owner thereof, Mary Jane Stout, knowingly obtain or exert control over a certain motor vehicle [1666] to wit; a 1976 Plymouth Sedan, Serial #RH41G6A160499, by threat in violation of Ohio Revised Code, Section 2913.02, entitled Grand Theft of a

motor vehicle contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio." The fifth count is exactly the same as count four Grand theft, only it's Grand Theft of a firearm, a 357 caliber Smith & Wesson, Model 28-2, Serial #552178, handgun owned by Norman Stout. There are no specifications as I mentioned in counts four and five the two grand theft, Grand Theft motor vehicle in count four, Grand Theft firearm count five. Now that is the substance of the indictment with which the defendant stands charged in this case. Each of these crimes as you can hear from the reading of them are brought under specific sections of the code aggravated murder, attempted aggravated murder, aggravated robbery, grand theft, and grand theft.

Now, as you can readily see, there are certain elements of proof required of the State, essential elements of the crime which the State must prove and will prove beyond a reasonable doubt in order for the Jury to properly convict or find the defendant guilty of each of these separate offenses. [1667] I'd like to review very briefly with you the elements of the offenses charged. The first count of aggravated murder in violation of 2903.01 (B) of the code, the State must prove that (1) on or about May 14, 1984 (2) this defendant purposely (3) caused the death of Mary Jane Stout (4) while committing or attempting to commit aggravated robbery or while fleeing immediately after committing or attempting to commit the offense and (5) that the offense was committed in Guernsey County. Those are the essential elements of the crime of aggravated murder as charged in count one of this indictment. Specification one: the elements of specification one to the first count are that the aggravated murder was committed by the defendant for the purpose of escaping detection, apprehension, trial, or punishment for another offense. In this case the aggravated robbery, the armed robbery, specification two to the first count. That the offense of aggravated murder was committed

by the defendant, the offense was part of a single course of conduct which involved the purposeful killing or attempting to kill two or more persons; in this case, the killing of Mary Jane Stout and the wounding of Norman Stout. Specification three to the first count: that the [1668] offense of aggravated murder, once again, was committed by the defendant (2) while the defendant was either committing, attempting to commit or fleeing after committing or attempting to commit the offense of aggravated robbery and that the defendant was the principal offender in the case.

Specification four, as I've mentioned, is the gun specification that merely needs to be proven that at the time he committed the offense of aggravated murder, he had a firearm on or about his person or under his control. Count two: attempted aggravated murder, very similar to the murder except the act was not committed. That on or about the 14th day of May, Clyde Daniel Wesley purposely attempted to cause the death of another person, Norman Stout, while the defendant was committing, attempting to commit or fleeing immediately after committing or attempting to commit the crime of aggravated robbery, armed robbery, and that the crime, once again, was committed in Guernsey County.

There is also a firearm specification to the attempted aggravated murder count; that he was armed at the time with a firearm, aggravated robbery. The third count: that this defendant on or about, once again, May the 14th of 1984, in attempting or [1669] committing a theft offense; that is, while stealing property or attempting to do so or while fleeing immediately after stealing or attempting to steal, did then and there have a deadly weapon on or about his person or under his control, and once again, that the crime was committed in Guernsey County. There is a firearm specification to the aggravated robbery; that is, that the deadly weapon used was a firearm, that he had it on his person and under his control.

Fourth count: Grand theft of a motor vehicle. That on or about May 14, '84, this defendant knowingly obtained or exerted control over a motor vehicle; in this case, a 1976 Plymouth, owned by Mary Jane Stout with purpose to deprive the owner thereof by the use of threats, and that the offense was committed in Guernsey County.

Count Five is the same as Count four, only the item stolen in that fifth count is the 357 Magnum Revolver owned by Norman Stout. There is no specification to either the fourth count or the fifth count.

Now, these are the essential elements of each of these crimes and each of these specifications as charged in the indictment which the State is [1670] required and will prove to you by evidence, convincing you beyond a reasonable doubt. Let's look at the facts. Before this shooting incident on May 14, 1984, Mary Jane Stout and her husband, Norman Stout, both being then 54 years of age, lived in a home they owned, located in the western part of Guernsey County, approximately one mile this side or east of the Guernsey, Muskingum County Line. The house is located fairly close to Interstate 70. My estimate would be somewhere in the range of one hundred yards or so north of the interstate and is located on County Road 44 which passes underneath the interstate near their home. Mr. and Mrs. Stout lived alone there in the house as their children were grown and gone from the home.

Now, immediately prior to May the 14th, this defendant, Clyde Daniel Wesley, had been living in West Tawakoni, Texas with his mother, I believe. That town is located in, I believe, Hunt County, Texas, somewhere about ---not too far northwest of Dallas. He had lived in Texas for some time; however, he had previously lived in the Cannonsburg, Pennsylvania area which is in the vicinity of

Washington, Pennsylvania. During the period of [1671] time he was living in Cannonsburg, Pennsylvania, he had a close friend there by the name of John David Stumpf. However, the two of them hadn't been together or seen each other from the time this defendant moved to Texas. On May the 11th, 1984, Clyde Daniel Wesley and a young man by the name of Norman Leroy Edmonds of Mesquite, Texas, which is another town in the Dallas area, who had worked together on construction there, decided to leave Texas to go to Cannonsburg or to Washington, P.A. for a visit. It was principally Wesley's idea, this defendant's idea, because he wanted to visit his friends there. The two of them left on that date on May 11th traveling in a brown and tan colored 1977 Pontiac Grand Prix automobile owned by Edmonds and bearing black and white Texas license tags, QAX 229. They arrived in Washington, Pennsylvania, the evening of Sunday, May the 13th, 1984. The following day being Monday, May the 14th, 1984, Wesley, this defendant, and Edmonds got together with John David Stumpf. Wesley's friend in Cannonsburg which is about ten or fifteen miles from Washington, P.A. They spent the afternoon of Monday, May 14th shooting pool and just passing the time with no apparent purpose. That was the [1672] first time Edmonds had met John David Stumpf. At that time there in Cannonsburg on May the 14th this defendant, Clyde Daniel Wesley, had in his possession a black 25 caliber automatic pistol which he had owned for some time and which he regularly carried. Edmonds had in his car a chrome colored 25 caliber Raven Automatice Pistol and a nine millimeter black automatic pistol, both of which Edmonds had purchased in Texas sometime before they left Texas on May the 11th. During the course of the day on Monday, May the 14th of '84, the three of them had been talking about guns generally and during the course of that conversation, Edmonds turned over to Stumpf the chrome colored 25 caliber Raven for him to examine. During the course of the reminder of the events of that date, that chrome colored Raven 25 caliber automatic

was never returned by Stumpf to Edmonds. Later in the day, the late afternoon or early evening hours on the 14th of May, while driving around and for no apparent reason, they came into the State of Ohio. They were westbound on InterState 70. They entered Guernsey County somewhere around 9:00, approximately, the evening of May the 14th or shortly before 9:00 p.m. As they were [1673] traveling westbound on Interstate 70 and as they approached the overpass over County Road 44 near the Stout residence, they saw the house somewhat isolated, no near neighbors, and decided to stop to see what they could steal. Edmonds was driving the car at the time and one of the other two, I'm not sure which made the request to stop. Edmonds stopped the car at the overpass near---on the interstate near the Stout residence. This defendant and Stumpf left the car and walked down the bank towards the house, both of them armed with 25 caliber automatic pistols. This defendant having his own black pistol that he normally carried and Stumpf having the chrome colored Raven which he had acquired from Edmonds. Edmonds stayed with the car and did not go to the Stout residence. Several minutes later as he stood by the car at the overpass, Edmonds saw an outside light near the garage entrance or parking lot, if you will, of the driveway of the Stout residence come on, an outside flood light type arrangement, and he then saw a car being backed from the garage out into the parking area. He became frightened at this, got in his car, and took off heading westbound, continuing westbound towards Zanesville. He was [1674] low on gas, so he pulled off the interstate at the next exist for westbound traffic beyond New Concord which, I believe, is the Norwich exit to get gas. While the car was being gassed, Edmonds made a collect phone call to his father in Texas from a pay phone at the station. Edmonds had no money to pay for the gas, so when the car was filled up, he just left without paying. There were two young men there who were just loafing around, as I believe they knew the attendant who was on duty, and they saw this take place so they gave chase.

Edmonds continued westbound towards Zanesville with them after him. At the next exit westbound beyond the Norwich exit, Edmonds decided he wasn't familiar with the area and he decided to go back towards Washington P.A., so he got off and stopped on the exit ramp, the next exit beyond Norwich. These two young men then caught up to him and accosted him or confronted him about the gasoline, and he still had his nine millimeter pistol, he fired some shots, they ran, and he took off eastbound back towards Washington, P.A.

Now then, going back to the Stout residence, After this defendant and Stumpf left the car and [1675] went to the residence, they knocked on the door and told Mr. and Mrs. Stout, they were both there, they told Mr. Stout that they had car trouble and they needed to use the telephone. Mr. Stout admitted them, they got inside, they did the phone or purportedly used the phone, whichever, and at that time they then both drew their handguns and said "this is a hold-up". While Stumpf held Mr. and Mrs. Stout at gunpoint in the kitchen areas where the phone was, this defendant went through other parts of the house looking for items to steal including the billfold of Mr. Stout and the 357 caliber revolver which was located in the bedroom. After a period of time they then herded Mr. and Mrs. Stout down the hallway from the kitchen area to the end of the hall where there are two bedrooms as you face the end of the hall: one to the right, one to the left. They put them in the bedroom to the right. Mr. Stumpf continued to hold the two of them at gunpoint while this defendant ransacked the rest of the house, particularly the bedroom across the way. At this point in time, Mr. Stout, his wife was seated on the bed back towards the outside wall, he was closer to the doorway to the hallway, and Stumpf had the gun on them [1676] in the doorway. Mr. Stout at that point became convinced that they were both going to die and that he thought he might be able to save his wife's life if he rushed Stumpf and got him out of that

bedroom, perhaps, and gave her an opportunity to lock the door. Mr. Stout did rush Stumpf. This defendant was in the other bedroom at that time, but before he could reach Stumpf, Stumpf shot him right in the forehead once. This defendant came to the scene. Stumpf then shot him a second time in the top of the head. This defendant fired at him with his black gun, but missed. That gun apparently jammed because it did not fire any more, and the evidence from the crime laboratory will show that it has a tendency to jam after firing the first shot. After being struck almost between the eyes and in the top of the head, Mr. Stout fell to the floor, more or less, in the hallway and partially in the bedroom away from where his wife was. He was still alive, partially conscious, but unable to move, unable to get up from where he lay. Believing that he had killed Mr. Stout, John David Stumpf pitched the gun aside and left the immediate area back the hallway down the steps to the basement. At that point this defendant [1677] whose own gun was jammed, picked that chrome colored Raven up and as Mrs. Stout sat helplessly on her bed, shot her four times in order to leave no witnesses to the crime they thought they had committed in the other killing they thought they had committed. Two of the bullets fired---two of the four bullets fired into the body of Mrs. Stout penetrated her brain. She was killed almost instantly and fell on the bed where she was seated in her own bedroom. After firing the shots, this defendant then followed Stumpf back down the hallway down the basement. The keys were available there to the Plymouth automobile owned by Mrs. Stout, and they stole that car along with certain other items including the 357 Smith & Wesson Magnum Revolver owned by Norman Stout which they found in the bedroom. They drove the Plymouth over to the----to an area about fifty miles or so, an isolated area near Washington, P.A. where they abandoned it after wiping it clean of finger prints. The car was later found by Pennsylvania State Police. After abandoning the Plymouth vehicle, Stumpf and Wesley then made their way somehow to Washington, P.A. and went to a

friend's house where Edmonds in the meantime had gone, and they [1678] met up with Edmonds again the afternoon of May the 15th; that is, this shooting took place some place between 9:00 and 9:30 the evening hours the 14th. This would be the afternoon of the 15th. After all that had happened, Edmonds decided he wanted to go back to Texas. He didn't have any money, so he decided he wanted to sell that nine millimeter pistol the following day on the 16th. John David Stumpf who was still residing in Cannonsburg phoned a man by the name of John Dino, also in Cannonsburg, who indicated he was interested in buying that nine millimeter pistol. This defendant still had in his possession the 357 caliber revolver he had taken from the Stout residence the evening of the 14th. All three of them; that is, Stumpf, Edmonds, and this defendant, Wesley, drove to Dino's house in Cannonsburg. They sold both handguns, the nine millimeter pistol and Stout's 357 caliber Magnum to Dino. Edmonds and this defendant then dropped Stumpf off at his home and went back to Texas.

Now, let's backtrack to the night of the shooting again. That evening Chris Stout, who is a son of Mary Jane and Norman Stout, had called several times that evening to try to get his parents there at home. He didn't get any answer and not [1679] knowing why he wouldn't get an answer and where they might be, he became concerned. Eventually, he called the New Concord Police Department, although that's outside the village, and asked them if they would check on the house. They did dispatch a cruiser there and that's how these shootings were discovered first by the New Concord Police Department. The Guernsey---being in Guernsey County and not under their jurisdiction, they notified immediately the Emergency Squad because Mr. Stout was still alive and the Guernsey County Sheriff's Department who went there and began the investigation. Norman Stout was transported by the New Concord Emergency Squad first to Guernsey Memorial Hospital and then to Bethesda

Hospital. Mary Jane Stout was pronounced dead at the scene by the Coroner who then ordered her body taken to Union Hospital in Dover for an autopsy which was done and the autopsy performed the following day on May the 15th.

In the meantime, the Muskingum County authorities, specifically, the Muskingum County Sheriff's Department, were looking into this shooting incident, the incident at the gas station and the shooting incident involving these two young men. [1680] They had obtained the Texas license number off Edmond's car, gave it to the Sheriff's people. Also, they were able to trace the phone call which was a collect call from the pay phone at the filling station. And through those efforts were able to get the name of Edmonds, Norman Leroy Edmonds, as a suspect. They were coordinating their efforts with Lt. VanHorn and the other officers from Guernsey County, because they believed, and as it turned out correctly so, that the filling station incident in Muskingum County was connected up with the shooting incident at the Stout residence.

On Friday the 18th of May, a warrant for the arrest of Edmonds was issued by Muskingum County authorities, and they requested the Dallas County Sheriff's Department to arrest him which was done. Dallas County authorities notified our local Sheriff's department and the Muskingum County authorities that they had him in custody. And Lt. VanHorn and Detective Simms of the Muskingum County Sheriff's Department flew down to Texas on 18th and interviewed Edmonds that night. Edmonds told the whole story as far as he knew it of what happened a t the Stout residence and named this defendant, Clyde Daniel Wesley, and John David Stumpf [1681] as the two other persons involved. Edmonds was brought back to Muskingum County the next day on the 19th by VanHorn and Simms. The 19th being, I believe, a Saturday. On Monday the 21st of May arrest warrants were issued by the Cambridge Municipal

Court charging both this defendant and Stumpf with the aggravated murder of Mary Jane Stout.

Stumpf was arrested in Cannonsburg, Pennsylvania on the 21st in the evening, the same day the warrant was issued and voluntarily returned to this county on the 22nd of May.

This defendant, Clyde Daniel Wesley, was arrested at his mother's home in Texas by Texas officers about the 21st of May. I'm not sure of that exact date, and ultimately was returned to Guernsey County in late November of last year.

Norman Stout underwent surgery the early morning hours of May the 15th performed by Dr. Camma, a Neuro-surgeon, at the Bethesda Hospital. The two bullets were removed from his head miraculously. After a lengthy period of treatment and therapy, he recovered, not entirely, but he recovered and survived, and he will be here to testify before you.

These are the facts which the evidence will [1682] prove to you beyond a reasonable doubt, to prove the truth of the charges contained in this indictment: aggravated murder, attempted aggravated murder, aggravated armed robbery, grand theft of a motor vehicle, grand theft of a firearm.

In conclusion, I simply ask that you try to keep your attention focused upon what it is this case is all about. The specific charges as best you can, they'll be reviewed again for you after all the evidence is in, but the elements of each charge, the elements of each specification, give your undivided attention to the witnesses. The witnesses for the State and for the defense, because it is you, as you've been told before, you must determine what the testimony to believe, what part of the testimony to believe, and the testimony that is in conflict, which testimony to believe.

And after you weigh the credibility, assess the credibility of the witnesses and attach weight to their testimony to determine what facts have been proven by the evidence. In deciding this case, we simply ask---we use a lot of lawyer's language, but we simply ask that you twelve persons use your collective good judgment and common sense in listening to this case, listen carefully to the evidence, [1683] listen to the law as the Court will give it to you, and arrive at a verdict where justice is served, keeping in mind that justice is a two-way street. Justices for this defendant, but likewise, justice for the State, the people of this State who also have a vital interest here. I am confident if you do that, that you will return a verdict of guilty as to each count and each specification charged in this indictment.

Thank you.

* * *

[Testimony of James Eastman (Wesley's cellmate), R.33, Transcript of Wesley Trial, April–May 1985]

* * *

[2511]you last saw her here?

A. All during the time that I was in bedroom number "1" she apparently moved.

Q. But you don't recall seeing her move at all?

A. No, she did not move in the instances that I was shot and then left the bedroom.

Q. There was some testimony, Mr. Stout, of Dr. Camma which has been alluded to by Mr. Brown of the wound to the--between the eyes and a wound to the vertex and you've also testified that you were struck. Is there a particular area in your--on your person where you were struck that you know about?

A. The scar on my forehead, yes.

Q. Are the events of that evening clearer in your mind today then they were last fall?

A. They are clearer, yes.

MR. SCOTT: I have no further questions.

MR. BROWN: No questions, Your Honor.

THE COURT: You may step down, sir.

MR. PLUMMER: Your Honor, the State's next witness will be James Eastman.

JAMES EASTMAN

was called as a witness, and having been first duly sworn, was examined and testified as follows:

[2512] THE COURT: Mr. Eastman, before you begin to testify I would remind you that there are cameras in the courtroom. Do you decline to be photographed?

A. Yes, sir.

THE COURT: You decline?

A. Yes.

THE COURT: You do not want to be photographed?

A. Yes, sir.

THE COURT: Very well, your wishes will be respected.

DIRECT EXAMINATION

BY MR. PLUMMER:

Q. Please state your name and address.

A. James Eastman.

Q. And what's your address, James?

A. Presently Guernsey County Jail.

Q. And are you a resident of Cambridge, Ohio?

A. Yes, sir.

Q. And how long have you lived in Cambridge?

A. All my life. Twenty-three years.

Q. You're twenty-three years old?

A. Yes.

Q. What is your date of birth?

A. July 15, 1961.

Q. Now, James, you're presently in the Guernsey County Jail, is that right?

[2513] A. Yes, sir.

Q. How long have you been there?

A. A little over three and a half months now.

Q. Now, James, do you have a prior felony record?

A. Yes, sir.

Q. And what does that record consist of?

A. Grand theft.

Q. And when were you convicted of that?

A. Approximately a year and a half, two years ago.

Q. And what were you convicted of grand theft for?

A. Stealing of antiques.

Q. Were you sent to the reformatory for that?

A. Yes, sir.

Q. And did you plead guilty to that?

A. Yes, sir.

Q. And when did you got o the reformatory, James?

A. About 18 - 19 months ago.

Q. Do you remember what date or what month you were sent to the reformatory?

A. November of '83, I think.

Q. 1983?

A. Yes, sir.

Q. And how long were you at the reformatory?

A. Thirteen months.

[2514] Q. And when did you get out of the reformatory?

A January 10th of '84.

Q. So, you were in the----

A. December 10th, excuse me.

Q. So, you were in the reformatory about thirteen months?

A. Yes, sir.

Q. From November '83 through December 19th, 1984, is that right?

A. Yes, sir.

Q. Where were you at in the reformatory?

A. Fairfield.

Q. Lancaster, Ohio?

A. Yes, sir.

Q. Now, you're facing also charges now. That's why you're in the county jail, is that right?

A. Yes, sir.

Q. And you indicated you were--when were you incarcerated for those charges?

A. January 25th.

Q. Of what year?

A. '85.

Q. Okay, this year. Now, when you were first [2515] in the county jail, who was your roommate? Did you have a roommate?

A. Ann older gentleman and some other guy. I don't know them.

Q. You don't know who they were?

A. No, sir.

Q. At a later time did you have occasion to have Dan Wesley as a roommate?

A. Yes, sir.

Q. And when would that have been?

A. Approximately--I was took over to the county jail on January 28th. I was over there approximately a week and a half, two weeks before I was moved in with Dan Wesley.

Q. Now, is Dan Wesley in the courtroom today?

A. Yes, sir.

Q. Can you point him out, please?

A. Yes, sir. Right there.

Q. How's he dressed?

A. Brown suit.

MR. PLUMMER: Your Honor, may the record reflect the witness has properly identified the defendant Clyde Daniel Wesley?

THE COURT: Very Well.

BY MR. PLUMMER:

[2516] Q. Now, you indicated you were in the county jail a week to two weeks before you were moved in with Mr. Wesley, is that right?

A. Yes, sir.

Q. Did you then have some conversations with Mr. Wesley in that he was your roommate?

A. Yes, sir.

Q. And what did you then initially begin talking about?

A. The first--within the first four or five days we just talked a little bit about my case and what I was in there for and I was asking him a little bit about what he was in there for.

Q. And did you tell him what you were in there for?

A. Yes, sir.

Q. And that's the two charges you've alluded to, is that right?

A. Yes, sir.

Q. And did he--you indicated there was some conversation about what he was in there for, is that right?

A. Yes, sir.

Q. And can you tell us about that conversation?

A. Well, within the first four or five days, you [2517] know, we talked about my case and then after we talked about mine he started telling me that he was in there--what he was being charged for and everything.

Q. What did he tell you he was being charged for?

A. With the murder and attempted murder and robbery of the Stouts.

Q. What did he tell you he was being charged for?

A. With the murder and attempted murder and robbery of the Stouts.

Q. Okay, now my understanding you were--when this incident occurred on May 14, 1984, you would have been in prison, is that right?

A. Yes, sir.

Q. Out of this county?

A. Yes, sir.

Q. Go ahead. Tell us how did the conversation about what he was in there for, how did that come up?

A. We just really started talking about--I asked him what he was in there for and he told me. Then I just started asking him questions about his, you know, what happened and everything.

Q. Had anybody ever told you to do that?

A. No, sir.

Q. Tell us what you talked about then.

A. Well, we talked about what he did. He said--I asked him, you know, what happened exactly [2518] what happened. He told me what happened.

Q. What did he say happened?

A. He said that him and a guy by the name of Stumpf and a guy by the name of Stretch----

Q. Do you know Stretch's name?

A. His real name, no, sir.

Q. He just said Stretch?

A. Yes, sir.

Q. Go ahead.

MR. PLUMMER: Can the jury hear?

THE JURY: Yes.

THE WITNESS: Okay, that him and Stumpf and Stretch, they came down to Cambridge and they was driving through and he told----

BY MR. PLUMMER:

Q. Did he say what road they were driving on?

A. No, sir.

Q. Okay.

Q. Then they came in Cambridge or out there at Muskingum county and they went into--they stopped the car and Stumpf and Wesley got out and they told Stretch to wait there, they was going over to this house.

Q. Okay, and that would be Stumpf and Wesley got out of the car. Is that what he told you?

[2519] A. Yes, sir.

Q. And did they say why? Did Wesley tell you why they had stopped?

A. Well, I guess him and Stumpf had planned on going over to the house to rob it.

Q. Did they say why they stopped at the particular place they stopped at?

A. No, sir.

Q. Tell us what in your best recollection tell us what Wesley told you.

A. Okay. He said that they went over to the house, Stout's house, and knocked on the door and said they needed to use the phone or something and they went into the house and once they got in the house they told him they was robbing him.

Q. Did he say who said that?

A. No, sir. And then he said that Stumpf was standing there holding the gun on them. He was standing there.

Q. Did he say--did Wesley tell you where that was in the house?

A. He just said one of the rooms. He didn't say exactly which room. And Stumpf--well, the man, Mr. Stout, I guess, he lunged at Mr. [2520] Stumpf and Wesley told him to shoot him. He shot him. I guess he fell down and then I guess Mr. Stumpf panicked, dropped the gun and Wesley picked up the gun and shot the lady. After he shot the lady I guess they was getting the rest of the stuff they was taking out of the house, they was going downstairs getting ready to leave. As they was turning to leave I guess they heard her moan or say something and then he said he turned around and shot her again.

Q. Who said he turned around and shot her again?

A. Mr. Wesley.

Q. Shot who again?

A. Mrs. Stumpf and then when they went downstairs---

Q. Mrs. Stumpf or----

A. Mrs. Stout.

Q. Wesley said he turned around and shot her again?

A. Yes, sir.

Q. Is that the words he used?

A. Yes, sir. And then they went downstairs, I guess through the garage to get ready to leave and the car that they had come in was already gone, so they took the Stout's car and headed back to Pennsylvania. I guess when they got [2521] back to Pennsylvania they met back up with Stretch and Wesley asked him what happened and he said he went to get gas and didn't have the money to get the gas so he took off.

Q. Stretch took off?

A. Yes, sir, from the gas station and Stretch told him that he was chased by a couple guys but he had shot the guys and killed them. Wesley said, are you sure you killed them and Stretch said to him, yes and then he said well, as long as you kill them. He goes, both the people in the house are killed. We don't have to worry about it. They won't make identity and then they went about their ways.

Q. Now, Mr. Eastman, going back to the incident back in the rooms that Mr. Wesley told you about, did he say Stumpf was watching Mr. and Mrs. Stout in one of the rooms? Is that what you said?

A. No. He said to me, he said that they was standing there and he had a gun on them and Stumpf had a gun on them. He didn't say which room, but he just said they was standing there.

Q. And then tell us what happened.

A. He said that the man, Mr. Stout, lunged at [2522] Stumpf, he said to shoot him. He shot--Stumpf shot Mr. Stout. Mr. Stout fell down.

Q. Did he say how many times that Stumpf shot?

A. No, sir.

Q. Go ahead.

A. And then after that happened Stumpf panicked, dropped the gun, Wesley picked up the gun and shot the lady, Mrs. Stout.

Q. Wesley said they----

A. Then they was getting ready to leave. He heard her moan or cry out or something, turned around and shot her again.

Q. Wesley said he went back and shot Mrs. Stout again?

A. Yes.

Q. Do you remember anything else that Mr. Wesley told you what happened in the house?

A. No, sir.

Q. Now, Jim, when did you tell this story to the Guernsey County Sheriff's office? Was it in March sometime?

A. About the 14th of March.

Q. Now, did Lt. VanHorn ever tell you or any member of the Guernsey County Sheriff's office or myself or Mr. Scott or any police [2523] officer every tell you to

engage in a conversation regarding this incident with Mr. Wesley?

A. No, sir.

Q. Did we ever make you any promises?

A. No, sir.

Q. Have we ever told you that we would be lenient on you on the charges that are pending?

A. No, sir.

Q. Back on the 14th , why do you think that--or earlier than that, when Mr. Wesley was telling you this, did he tells you why he was telling you this?

A. He said that at the time he never had no one else to really talk to that he thought he could trust.

Q. And he apparently thought he could trust you, is that right?

A. Yes, sir.

Q. Now, why did you got to the--who did you talk to at the Sheriff's office about this incident?

A. Mr. VanHorn.

Q. And why did you ask to see Lt. VanHorn?

A. Yes, sir.

Q. Why did you do that?

A. Well, I wanted to be moved out of the cell [2524] because a few days earlier he'd made--Mr. Wesley---

MR. BROWN: Objection.

MR. PLUMMER: Your Honor, I think he can testify as to why he----

THE COURT: Objection is overruled.

BY MR. PLUMMER:

Q. Go ahead.

A. A few days earlier Mr. Wesley was making a couple weapons and he had been talking about he wanted me to help him escape out of there and----

Q. What kind of weapons had he made?

A. Well, I only seen he made one. He had another one in there of a pop can that –it was ripped open and had sheets around it, it was made into like a shank.

Q. A knife?

A. Yea.

Q. Was it sharp?

A. Yes, sir.

Q. Did he ever say----

A. I didn't see him make that, but it was in there.

Q. Did he ever say anything about that?

A. He said that he goes on one occasion he said [2525] this would cut somebody's throat wouldn't it? I said, yes, sir.

Q. What other kind of weapons did he have in the cell?

A. He made an axe out of –okay, in the cell you got like steel bunks and the bottom of the bunks there's plates square like that and he bent off one of them and you got these things you clean the toilet with, he took the sponge thing off so he and the plastic handle and he had sheets tore up and he tied it all up and made it into an axe.

Q. Did he say anything like about that?

A. He said that would, you know, he could use that to go out the backdoor or through the wall or he could use that against one of the guards.

Q. You mean to chisel away at the wall?

A. Yes, sir.

Q. And when did you find out about those weapons, Jim?

A. Well, the first one, the one, the shank, the knife, I found out about that probably about like four or five days after I was in there he showed it to me. The other one it would [2526] have been closer to three maybe four weeks, because I sit there and watched him make that.

Q. Did he ever talk to you about escaping?

A. Yes, sir.

Q. What did he tell you?

A. I think he wanted me--he was trying to help me to get out on bond somehow so I could help him. He wanted me to steal a couple cars; come back into the Sheriff's Department; shoot the deputies, whoever was on; come back to his door; open it up; let him out; give him a gun. Then me have a gun and then---

Q. Did he tell you how he wanted you to dress or anything he wanted you to wear?

A. No, sir. He said--well, only thing he said about that was when I first come I he says, since they knew me there they'd probably let me right back in. Then after that when I come back to his cell I'd have to put on a mask so the inmates wouldn't see me.

Q. What did you say when he was suggesting all these things, Jim?

A. I just at first I was just listening to him and then one night he asked me to watch--this was after he made the axe, he wanted me to [2527] watch at the door for him because he wanted to go out through the back and I said----

Q. Now, what do you mean out through the back?

A. Out through the back wall. He wanted to chisel out through the back wall and escape back there and I wouldn't watch for him and he got--he seemed to get mad at me and he said, well, I see you ain't going to be able to be any help and he sat down on his bunk and just stared at the wall. The next day is when I went to Mr. VanHorn.

Q. Did that concern you a little bit?

A. It concerned me a lot.

Q. Were you concerned for your personal safety?

A. Yes, sir.

Q. Did you sleep that night?

A. No.

Q. That next day, what did you do?

A. I went to Mr. VanHorn and told him about the weapons in there and about what, you know, Wesley and me had talked about and I asked him, I said, move me out of there and the following day he moved me.

Q. Now, was there a shake-down at the cell?

A. Yes, sir.

[2528] Q. A shake-down, I mean, was there a check inspection?

A. yes, sir.

Q. And what was found then?

A. Okay. In my cell they found the axe; they found the pop can that was made into a knife; some rope, a jump rope; a pair of num chucks. I can't explain what they are.

Q. What were they made out of?

A. Out of paper.

Q. Did he make them or did you make them?

A. He made them.

Q. When did he make them?

A. I don't know when he made them for sure.

Q. What did they look like?

A. They're what they are they're like a weapon. May I?

Q. Sure.

A. Like /it would be this cut in half. They'd be even, then a rope in between them and you turn them around, they're used in martial arts.

Q. Jim, has anybody ever offered you any deals to testify?

A. No, sir.

Q. And is what you have said here in front of this [2529] Judge and in front of this jury has that been the truth?

A. Yes, sir.

Q. And the things that you told us that Mr. Wesley said, in fact, is that what he said to you?

A. Yes, sir.

MR. PLUMMER: No Further questions.

THE COURT: Mr. Brown.

MR. BROWN: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. BROWN:

Q. Mr. Eastman, what's your date of birth?

A. July 15, 1961.

Q. When did you turn 18?

A. That would be about----

Q. July 1979?

A. Somewhere around there.

Q. Well, if you had----

A. I'd have to figure it out.

Q. If you add 18 to 1961, don't you come up with 1979?

A. Yes.

Q. Would that be right?

A. I'd have to figure it out, yeah.

Q. Now, Mr. Plummer asked if you have a prior record [2530] you indicated that you had a grand theft charge. It was--was it officially called grand theft,

subsequent offense of November of '83? November 8th of '83?

A. Yes, sir.

Q. And you also have a robbery charge, don't you, October 31, 1980, felony in the second degree?

A. Well, on that charge there I ain't so sure. It's been like five to six years ago and I wasn't sure if I was really charged or not.

Q. Oh, I see.

A. I remember being put on probation but I don't remember being actually charged with robbery.

Q. So, you just got put on probations and never charged with anything then?

A. Well, like I said, it's been five or six years ago. I ain't sure.

Q. Yeah, but you didn't tell us that before. You didn't tell us about the robbery charge. You just told us about the other one.

A. You never asked.

Q. But in fact you've got both of those, don't you?

A. Well, like I said, the robbery I ain't sure if I was 17 or 18.

Q. Well, if it has October 31, 1980 as the date [2531] of it and you're 18 years old in 1979, that would sure make you over 18, wouldn't it?

A. Yes, sir.

Q. Then the next one you came up with was the grand theft and you got sent to prison for that one.

A. Yes, sir.

Q. And you got paroled?

A. (Witness nodded in the negative.)

Q. You just got let out?

A. (Witness nodded in the affirmative.)

Q. You're not on parole?

A. (Witness nodded in the negative.)

Q. You indicated you got released December 19, 1984?

A. Yes, sir.

Q. On that charge?

a. Yes, sir.

Q. And you're back in the county jail on January 25, 1985?

A. Yes, sir.

Q. Mr. Plummer asked some questions about that and you were there for burglary and a theft.

A. Yes, sir.

Q. Now then, while you're in the cell with Dan [2532] Wesley, isn't it true that you were on at least two occasions and possibly more taken out of that cell to ask whether or not you had gotten a statement from Dan Wesley?

A. No, sir.

Q. Lt. VanHorn never did take you out of there and say to you, ask you if you had a statement--took a statement from Dan Wesley?

A. No, sir.

Q. Did you--isn't it true you went back to the cell each time that you were out of the cell and told Dan Wesley that someone was trying to see if he had made any statements to you?

A. No, sir.

Q. You never disclosed that?

A. No, sir.

Q. You understand you're under oath?

A. Yes, sir.

Q. Have you ever acted as an informant for the police before?

A. Yes, sir.

Q. And when was that?

A. About a month ago.

Q. That's the time you set up Mattie Thompson and you set up Pitman--Ricky Pitman when you [2533] stood on one end of the phone and you had the police call while you're there and they're listening in too, set somebody up on a burglary charge?

A. Yeah.

MR. SCOTT: Objection to the phraseology, he set somebody up.

THE COURT: Objection is overruled.

BY MR. BROWN:

Q. That's right?

A. Would you repeat the question?

Q. Sure. That's when you set Mattie Thompson up and you set up Ricky Pitman by being at the Cambridge Police Department holding on the receiver while they listened on the other end to set them up on a burglary charge?

A. They asked me to.

Q. Pardon me?

A. They asked me to.

Q. And you weren't charged in relation to that?

A. No, sir.

Q. You were brought in for that and you set them up, but you didn't get charged for it?

A. No, sir.

Q. Now then, Pitman and Thompson were in the jail [2534] at the time that you were there from January through march, weren't they?

A. Yes, sir.

Q. And they were back in the tank, back in the bull pen, so to speak?

A. Yes, sir.

Q. You didn't want to be back there because you and set them up, right?

A. Yes, sir.

Q. And they've also told you when yon go back to prison they're going to make sure you get yours for doing that, didn't they?

MR. SCOTT: Objection, Your Honor. I think he's pursued it far enough on those lines.

MR. BROWN: Your Honor, I think this is wide open.

THE COURT: You may ask the question. Objection is over-ruled.

THE WITNESS: Repeat the question.

BY MR. BROWN:

Q. They were back there in the tank. You wanted separated from them because they told you that they were going to get you for setting them up.

A. Yes, sir.

Q. So you were in another part of the cell, another part of the jail. You got separated?

[2535] A. Yes, sir.

Q. Who separated you?

A. Peanut.

Q. Did Lt. VanHorn know you were separated for that purpose?

A. I don't know.

Q. You don't know? Peanut's the only one who separated you?

A. That's who I told. I told Peanut the day I come in there. That's the person I went to.

Q. So, right now as Mr. Plummer advised or questioned you, you have a burglary charge and also a grand theft pending against you?

A. Yes, sir.

Q. And you've also been sentenced once before. You went up on the grand theft and probation on the robbery

went up on the grand theft and you're facing these two charges now.

A. Yes, sir.

Q. You don't want to go back, do you?

A. No, sir.

Q. Are you concerned about what Pitman and Mattie Thompson may be waiting for you up there since they were already shipped?

A. I think I could handle whatever situation [2536] might occur.

Q. But you couldn't handle over here. You want[illegible] separated from them because you were afraid of them.

A. Why prevent trouble when it can be prevented.

Q. Okay. Now, with respect to the questions th[illegible] you had or the conversation you had with Dan Wesley, I want to ask you specifically about those. You moved into the cell with Mr. Wesl[illegible], you've been there for several days and you started talking about your case.

A. Yes, sir.

Q. All right. In fact, Dan was helping you with your case, wasn't he talking about your case and reviewing some things with you?

A. Yes, sir.

Q. He had one of the code books, the Criminal Code books that I had provided him to read?

A. Yes, sir.

q. And he had that at that time. He was trying to help you as a friend, is that correct?

A. Yes, sir.

Q. And you indicated in response to Mr. Plummer's question that you thought this was--you thought that Wesley thought you were somebody he could [2537] trust?

A. Yes, sir.

Q. You were suppose to be a friend?

A. Acquaintance.

Q. Now then, specifically when Mr. Plummer asked you to tell what happened you indicated that Mr. Wesley and Mr. Stumpf were standing together and that--and that Stumpf panicked.

A. After Mr. Stout lunged.

Q. Mr. Stout rushed him?

A. Yes.

Q. So, your testimony is they're standing together there when he rushed him and Stumpf shot him?

A. Yes, sir.

Q. And that's what Dan told you?

A. Yes, sir.

Q. Did he tell you were this took place?

A. No, sir. In one of the rooms.

Q. Pardon me?

A. He just said one rooms.

Q. Isn't it a fact, Mr. Eastman, that Dan Wesley was talking to you about Stumpf's case because he had notes from the Stumpf's transcript in front of him and he was talking to you about what Stumpf had said took place and how Stumpf [2538] had given several different stories and he was talking to you about Stumpf's case and not what he did but what Stumpf did?

A. No, sir.

Q. You're under oath, you understand that?

A. Yes, sir.

MR. PLUMMER: Your Honor, I believe the witness understands he's under oath. I would object to that question.

THE COURT: Objection is overruled.

BY MR. BROWN:

Q. With respect tot his information that you had in the jail cell about the johnnie mop handle, you were

talking about in fact you took the bristles out of that johnnie mop handle, didn't you?

A. No, sir.

Q. You removed the head of that johnnie mop handle at the time you guys were working around in the jail?

A. No, sir.

Q. In fact, you were the one that wanted to break through the wall?

A. No, sir.

Q. All right. Are you aware you indicated Mr. [2539] Wesley wanted to go out through the back way to escape out the back?

A. Repeat that.

Q. You indicated Mr. Wesley wanted to escape out the back of the cell.

A. Yes, sir.

Q. You're aware that that's lighted back there and there are cameras back there, aren't you?

A. Yes, sir.

Q. Now, this marital arts things that you described that was made out of some sheets and a piece of toilet paper, wasn't it? It was made out of paper?

A. It was made out of newspaper and sheets.

Q. But you held up a piece of wood.

A. Just to indicate what it was like.

Q. But it was made out of toilet paper.

A. No, sir.

Q. And newspaper.

A. Newspaper, yes.

Q. What did you do with the head of the johnnie mop when you took it off the handle?

A. I never took it off the handle.

Q. Isn't it true you hid it behind the radiator?

A. No, sir.

[2540] Q. Now, you're looking for leniency on this case from the prosecution, aren't you?

A. I hope they took in regard.

Q. You're looking for them to take into consideration all the help you've given them today, isn't that right?

A. I hope they will.

Q. Okay. In fact, you've--you wanted your attorney to give you county time for this, don't you?

MR. SCOTT: Objection. The disposition--he answered the question.

THE COURT: I'm going to overrule the objection.

THE WITNESS: Repeat the question.

BY MR. BROWN:

Q. You've asked your attorney to secure county time instead of prison time for you.

A. I said I would like to have county time.

Q. Do you recall talking to Mark Graham several days ago?

A. Could have.

Q. Do you recall telling him that you expect to go fishing with him this summer because you were going to be given county time and out?

A. That's if I--I ain't been found guilty on [2541] nothing yet, but I think I can beat the cases I'm in on.

Q. Did you say that?

A. To him?

Q. Yes.

A. Yes, sir.

Q. And did you tell him that your attorney was looking for county time?

A. Yes, sir.

Q. Just now you were saying you could beat those cases. So, what are you going to do county time for?

A. They could get me on one but they couldn't get me on another one.

Q. Plain and simply, Mr. Eastman, you do not want to go back to prison and you will do anything to keep from going back to prison, won't you?

A. Not anything, no, sir.

MR. BROWN: I have no further questions.

REDIRECT EXAMINATION

BY MR. PLUMMER:

Q. Did you ever hurt anybody in any of those crimes that you were convicted of?

MR. BROWN: I'm going to object. That has nothing to do with the cross-examination.

[2542] MR. PLUMMER: He brought up the issue himself, Your Honor, the issue of robbery.

THE COURT: I'm going to overrule it.

BY MY PLUMMER:

Q. Did you ever hurt anybody?

A. No, sir.

Q. And you pled guilty to those charges that you admitted to what you did, is that right in court?

A. Yes, sir.

Q. You came in here and told the Judge and admitted to him what you did, is that right?

A. Yes, sir.

Q. And nobody's offered you anything at all for testifying here?

A. Nothing at all.

Q. Have you told the truth before this Court and this jury?

A. Yes, sir.

MR. PLUMMER: I have no further questions.

MR. BROWN: I have no further questions.

MR. SCOTT; May we approach the bench, Your Honor?

THE COURT: Yes sir.

* * *

IN THE COURT OF COMMON PLEAS
IN AND FOR THE FIFTH DISTRICT
COURT OF APPEALS, GUERNSEY
COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff,	:	
vs.	:	CASE NO. 9692
CLYDE DANIEL WESLEY	:	
Defendant.	:	PART III

Transcript of the Proceedings held on April 8, 9, 10, 11, 12, 15, 17, 17, 18, 22, 23, 24, 25, 26, 27 and May 2 and 6, 1985 before the Honorable John E. Henderson, Judge.

APPEARANCES:

C. Keith Plummer
James R. Scott
Prosecuting Attorneys
139 W. 8th St.
Cambridge, OH

For the State.

Donald D. Brown
Sam R. Raptis
Attorneys at Law
Guernsey Savings & Loan Bldg.
Cambridge, OH

For the Defendant.

FILED COMMON PLEAS COURT
1985 DEC 2 AM 9:02

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CLERK OF COURTS
GUERNSEY COUNTY

* * *

[3023] all throughout the trial and since this is still a part of the procedure I want you to be just as attentive as you have been in the past both to the State and to the defense.

Gentlemen, are you ready to proceed?

MR. SCOTT: State is ready, Your Honor.

MR. BROWN: Defense is ready, Your Honor.

THE COURT: Mr. Scott or Mr. Plummer, you may proceed.

MR. SCOTT: Thank you, Your Honor.

May it please the Court, gentlemen of counsel and ladies and gentlemen of the jury. As the Judge indicated to you yesterday, you have now heard all of the evidence you will ever hear in this case before you are asked to decide. There remains only two things yet to be done before this case is finally submitted to you for deliberation and your verdict. First these arguments by the attorneys for both sides.

As the Judge has mentioned, by reason of the law, the provisions of the law and the fact that the State of Ohio in this case has the burden of proof, which we've talked about, the State is given the opening and closing portions of the final arguments and the defense [3024] has the middle portion.

Now, as Judge Henderson has mentioned to you also, what we say in these final arguments are not items of

evidence and they should not be considered as evidence. The evidence in this case, as you've been told time again, are the exhibits which have been admitted into evidence and the testimony of the various witnesses from the witness stand. The arguments are designed to assist you in understanding and evaluating the evidence which has been presented. It is our opportunity to tell you what we believe the evidence has shown as presented in this case and what inferences, if any, may be drawn from the evidence.

Now, recall if you will, sometime ago when we gave opening statements in this case at that time we gave you a preview or perhaps for lack of a better word, an advanced birds-eye view of the overall factual picture we expected to develop by the evidence as it's presented. You have since then heard the evidence. You've heard it from the various witnesses, the stipulations which were read to you which are agreed facts between the State and the defense and [3025] the testimony of the various witnesses as it came to you in bits and pieces. These final arguments are now our opportunity to try to pull this back together for you. That is, to put the pieces of this picture, if you will, into place and to give you the overall picture we feel has been proven by the evidence in the case.

As we've mentioned at the outset and has been mentioned from time-to-time, the indictment in this case charges five separate crimes. Each is referred to as a count. The first count, second count and so forth. I reviewed for you at the time and read to you the verbatim language in the indictment and I do not propose to do that at this time. The five charges, sufficient to say, are aggravated murder in count one with specifications; count two, attempted aggravated murder with a firearm specification; count three, aggravated robbery with a firearm specification; count four, grand theft of a motor vehicle and count five, grand theft of a firearm. As was mentioned to you far back as the voir dire,

which seems quite some time ago when you were being selected, [3026] each of these crimes is separately charged and each of these crimes should be separately considered by you in deliberating on the evidence in this case.

Now, as I say, I do not wish to go back and read the indictment to you but if you will recall at the time of our opening statements I mentioned to you the various elements or parts of each of the crimes charged in the indictment and each of which elements the State is required to proved beyond a reasonable doubt in order for the jury to find the defendant guilty of that particular crime. I would like to review once again for you in order to bring it back into your mind the elements of these crimes charged in the indictment. Before doing that, though, I would say that this case in addition to other somewhat unusual circumstances has one particular circumstance which is unusual in that three of these crimes are not disputed. That is, that the defendant has on the witness stand, himself, admitted his guilt to three of the five crimes charged in this indictment.

The third count being the offense of [3027] aggravated robbery, the substance of which is that the defendant while committing a theft offense, that is, while stealing property was armed with a deadly weapon. He has admitted that fact or those facts and the specification the firearms specification to the third count of aggravated robbery, that is, that the deadly weapon he had on his person at the time of that offense was a firearm. He has admitted that.

With regard to the fourth count and the fifth count--the fourth count in the indictment being grand theft of a motor vehicle and the fifth count being grand theft of a firearm, the defendant likewise on that very witness stand has admitted his guilt to you that he stole a motor vehicle and that he stole a firearm, that is, that he took each of those

items of property without the voluntary consent of the owner and by threat. He has admitted these crimes to you so I wouldn't think you would have any difficulty in reaching your verdicts of guilty as to those three crimes charged in the indictment.

However, there are, as you are well aware, two additional crimes charged in this indictment. [3028] The first count and these are in dispute and not admitted by the defendant. The first count in the indictment charges the crime of aggravated murder and I'd like to review, briefly, the elements of the crime of aggravated murder as charged there. The elements of that crime which the State must prove beyond a reasonable doubt are as follow: (1) that on or about May 14, 1984 this defendant, Clyde Daniel Wesley, purposely; (3) caused the death of Mary Jane Stout; (4) while attempting or committing the crime of aggravated robbery, which I mentioned to you is committing a theft offense, while armed with a deadly weapon, in this case a handgun and (5) that this crime of aggravated murder took place in Guernsey County. Those are the essential elements of the crime of aggravated murder as charged in the first count in this indictment.

There are specifications to the first court in the indictment, the aggravated murder charge. Specification one charges that the crime was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the defendant in this case, [3029] aggravated robbery, theft while armed.

Specification two charges that the aggravated murder was part of a course of conduct involving the purposeful killing or attempting to kill two or more persons, in this case Mary Jane Stout and Norman Stout.

Specification three charges that the aggravated murder was committed while the defendant was either committing, attempting to commit or fleeing after committing or attempting to commit the crime of aggravated robbery; and then this is different, that the defendant was the principal offender.

Please note that there is no language in specification one or specification two but only in specification three that the defendant was the principal offender. We'll talk about that somewhat later but keep that in mind and finally, specification four which we refer to as a gun specification, again charges that the defendant had a firearm on or about his person or under his control while committing the offense of aggravated murder.

Those are the four specifications to the charge of aggravated murder as set forth in the [3030] first count in the indictment.

Now, the second count in this indictment charges the offense of attempted aggravated murder and the elements of that offense are as follows: that (1) on or about May 14, 1984, this defendant Clyde Daniel Wesley; (3) purposely attempted to cause the death of another person, Norman Stout; (4) while the defendant was either committing, attempting to commit or fleeing immediately after committing or attempting to commit the crime of aggravated robbery and (5) once again that that offense attempted aggravated murder was committed in Guernsey County.

There is one specification to the attempted aggravated murder charge again being a firearm or gun specification that the defendant had a firearm on or about his person or under his control at the time he committed the offense of attempted aggravated murder. It's the same type of gun specification

that I just read as specification four to the aggravated murder charge in count one.

Now, these are the essential elements of the two crimes which are really in dispute in [3031] this case aggravated murder in count one, attempted aggravated murder in count two and the details or elements of the specifications to those two charges.

Now, because of the nature of these charges and because the indictment does include specifications to each of the two disputed charges, I believe we should discuss briefly what decisions and what procedures you will be required to take in considering each of these two charges.

Now, the first count being aggravated murder your first job will be to consider the evidence and to determine whether or not the State has proven beyond a reasonable doubt each of the elements of the crime of aggravated murder as I've given them to you. If you find that the State has in fact sustained its burden of proof and has proved each element of the crime of aggravated murder beyond a reasonable doubt your job is not quite finished as to that first count because you must then move on and consider the specifications that I've talked about. You must then consider first the specification one to the first count, being the [3032] specification that the crime was committed to avoid detection, arrest and so forth and consider and determine whether or not the State has proven by the evidence beyond a reasonable doubt that that in fact is true. If you find the State has proven beyond a reasonable doubt the truth of the allegation in specification one then you should return a guilty verdict as to specification one. You should then proceed with specification two and specification three in the same manner, each of those three specifications which are referred to as aggravating specifications are separate and unto themselves, separate from the other two and shall be considered

separately and determined by you separately without reference to your decision with regard to any of the other three specifications.

Specification four requires your consideration to determine whether the State has proven beyond a reasonable doubt that the defendant had possession of a firearm at the time he committed the offense and again if you find that to be so you should return a guilty verdict as to the firearm specification to count one, [3033] which is specification four. As I've mentioned, each of these specifications is separate to itself and should be considered by you separately without reference to your decision of any other specification.

Moving to the second count or the attempted aggravated murder count, again your first job is to weigh and to consider all of the evidence in this case, apply the law as the Judge will give it to you after we finish these arguments, determine if the State has proven each of the elements of the crime of attempted aggravated murder beyond a reasonable doubt. If you find the State has in fact proven each element of the crime beyond a reasonable doubt your verdict must be guilty. However, then you still have another job to do with regard to this second count, the attempted aggravated murder, you must then consider the firearms specification.

Again, if you find that the State has proven beyond a reasonable doubt at that time defendant had in his possession or under his control a firearm when he committed the offense of attempted aggravated murder you must return [3034] a verdict of guilty of that specification. These are the considerations and the decisions you will be required ultimately to make with respect to the aggravated murder and the attempted aggravated murder charge. Let's look at the facts in this case. Again, this case is unique to some degree with regard to the facts because many, many of the facts in this case are not disputed. And I do not propose to rehash for

you in detail the testimony of all the witnesses brought to the stand for the State because you heard that evidence. You can recall that evidence as well as I and you can fairly well see where that evidence fits into the overall picture. However, I do wish to mention to you certain facts that I believe are not disputed in this case.

One, that Mary Jane Stout was in fact shot to death in a bedroom of her home the night of May 14, 1984, and she was shot four times. Two, that at the same time and place her husband, Norman Stout, was shot twice in the head once between the eyes and a second time in the top of the head.

[3035] Three, that this defendant, Clyde Daniel Wesley and John David Stumpf went to the Stout residence that night for the express, joint and common purpose of committing a felony of stealing a motor vehicle to be used in a later gas station hold-up.

Four, that when this defendant and Stumpf went to the Stout residence that night each of them was armed with a loaded firearm, each being a loaded 25 caliber automatic pistol. Stumpf having a 25 caliber chrome colored Raven pistol belonging to Norman Leroy Edmonds and Wesley having the 25 caliber black automatic pistol which he owned and which he regularly carried and which is in evidence and identified by him and by others as State's Exhibit "N".

Five, that Stumpf and Wesley used the subterfuge that they had car trouble and needed to use a telephone as a means to gain entrance into the Stout residence.

Six, that after both Stumpf and Wesley had drawn their guns on Mary Jane and Norman Stout in the residence and inquired about motor vehicles that this defendant, Wesley, thereupon searched the house particularly the [3036] bedroom areas, particularly bedroom number "1" where he

found assorted, handguns, long guns and ammunition which Mr. Stout owned and had stored there and upon discovering those items the defendant decided to steal those items as well.

Seven, that one of the guns that Wesley discovered in that closet and decided to steal and did in fact steal was a 357 Smith and Wesson magnum revolver owned by Norman Stout and which is in evidence as State's Exhibit "S".

Eight, that at sometime after the two of them entered the Stout residence Mr. and Mrs. Stout were escorted from the kitchen area down the hallway at gun point to bedroom number "2" that Mrs. Stout at one time was seated on the bed, Mr. Stout was standing next to the bed further away from the hall doorway.

Nine, that John David Stumpf stood in or near the doorway to bedroom number "2" holding Mr. and Mrs. Stout at gun point while Wesley searched through the closet in bedroom "1" across the hall gathering up guns and ammunition to steal.

Ten, that as he was being held by gun [3037] point by Mr. Stumpf. Norman Stout noticed that Stumpf was becoming nervous and he was afraid for his wife's safety.

Eleven, that he decided to approach or rush Stumpf in an effort to get Stumpf out of the bedroom, that is, bedroom number "2" where his wife was and to perhaps give her a chance to close the door or otherwise go to safety.

Twelve, that Mr. Stout approached Stumpf and as he did so he was shot by Stumpf twice, once between the eyes and once in the top of the head causing Mr. Stout to fall to the floor in bedroom number "1" across the hall.

Thirteen, that the two shots which struck Mr. Stout in the head and the four shots which struck the person of Mary Jane Stout, including the two fatal shots to the head, were all fired from the same gun being consistent with a 25 caliber chrome colored Raven which we do not have but which is similar in appearance to the chrome colored Raven gun in evidence as State's Exhibit "N-l".

Fourteen, that Mr. Stout recalls as he lay on the floor of bedroom number "l" after being shot hearing a conversation between two [3038] male persons followed shortly thereafter within less than a minute by four loud reports which he now believes to have been gun shots.

Fifteen, that one shot was fired by Wesley's black 25 caliber automatic, Exhibit "N" which lodged in the mattress in bedroom number "l" and the track of the bullet in the mattress indicated to have been fired from the general direction of the doorway to that bedroom and the bullet taking a downward track into the mattress. That bullet is in evidence as State's Exhibit "J".

Sixteen, that after both Norman Stout and Mary Jane Stout had been shot Wesley continued to gather up the guns he wanted to steal and and thereafter both he and Stumpf went to the garage and stole a red 1976 Plymouth automobile owned by Mary Jane Stout, which was in the garage area and which they later drove back to Pennsylvania and on the 16th of May, I believe it was or 15th perhaps, they eventually abandoned that vehicle in an isolated area over a bank some fifty miles from Washington, P. A. after attempting to wipe all fingerprints out of the vehicle.

[3039] Seventeen, that on May 16, 1984 Wesley sold the 357 magnum revolver owned by Norman Stout and which he had stolen from the Stout residence on the 14th to one John Dino in Canonsburg, Pennsylvania and that this

gun, the 357 magnum revolver is in evidence as State's Exhibit "S".

Now, this in my opinion, these in my opinion are the facts in this case which are not disputed.

Now, there are certain areas of disputed facts in this case where the evidence is in conflict but I would say to you that the area of dispute and the time span which is a dispute the events involved in this case, the time span of the disputed events are very small.

It starts at the moment Norman Stout decided to rush Stumpf and through the next few minutes thereafter during which both Norman Stout and his wife were shot to death. These are the disputed facts. You've heard the testimony how that all the evidence was gathered from Texas, from Pennsylvania, the crime lab evidence and all of those things, those all have a place in this trial to prove these [3040] charges but when you get right down to it what is disputed is what happened during those few moments from the time the shooting started until it finished in the residence of Mr. and Mrs. Stout. I submit that if you consider this dispute, the disputed evidence, I believe it can be narrowed down to basically three questions.

One, who actually shot and killed Mary Jane Stout, was it Clyde Daniel Wesley or was it John David Stumpf?

Two, did this defendant, Clyde Daniel Wesley, at any time during the course of these events at the Stout residence have a purpose to kill anyone?

Three, even if there's doubt as to whether or not Clyde Daniel Wesley did not personally fire the fatal shots which killed Mary Jane Stout or the shots which wounded Norman Stout, is he nevertheless guilty as an aider and

abettor of the crime of aggravated murder and attempted aggravated murder because he entered into a common scheme or design with John David Stumpf in the commission of the offenses and participated in the commission of the offenses? [3041] It's called an aider and abettor, we'll talk about that a little later.

It seems to me those are the three questions which are disputed in this case. Now, before we talk about the evidence which goes to those three, as I see them, disputed principle issues in this case, I'd like to talk a little bit about the credibility of witnesses and what your job is when the evidence is in conflict.

As we've told you time and again in this case, the jury decides the facts from the evidence; decides what facts have been proven by the evidence. You are called the trier of fact in this case. The Judge considers matter of law, the jury decides matter of fact. In this case as in any case where the evidence is in conflict to some degree and where there are differences in the testimony it becomes your job to resolve those differences. It becomes your job to decide what evidence you choose to believe and what witnesses you choose to believe. In order to decide that you must determine the credibility of the witnesses whose testimony is in conflict with that of others. [3042] Now, in order to do that as the Judge will instruct you, there are a number of things which you may consider in determining the credibility of a witness, the demeanor of the witness as you observed him on the witness stand, his candor or his reluctance to testify, his bias or prejudice, his interest in the outcome of the case, whether he was in a position to see and hear those things about which he testifies or any other matters which go to his truthfulness. Now, after the Judge says all of that and after I say all that, it really boils down to your collective and individual good common sense and good judgment as to what witnesses are believable and what witnesses are not. Now, the Judge will

go into that in more detail as to those matters that you should take into account, that you choose to in determining what witnesses are worthy of belief.

Now, let's look at the three disputed basic questions as I've mentioned them to you and relate those questions to the evidence in this case. Now, I won't attempt to insult your intelligence by saying that this record [3043] is crystal clear and without discrepancy or difference on the testimony because it's not so. There are discrepancies, there are conflicts in the testimony. I would simply caution you that these are the things that you must resolve in attempting to decide the issues, the basic issues in this case. I should caution you, I believe, that in any case where we have a number of witnesses we had today or in this case over the last several days relating to events which happened some eleven months ago there are bound to be minor discrepancies in the recollection of those several witnesses. You've all probably heard that experiments have been done where spontaneous action takes place in a classroom, for example, if someone runs in and shouts something and fires a gun and so on then the members of that class are asked to write down exactly what they recall just within a few minutes. There will be differences. People observe and notice things in different perspective then others so there are bound to be minute or discrepancies and to that extent conflicts in the testimony of a case of this nature. I would simply caution you that do not [3044] be led into blind alleys by minor discrepancies in the testimony. The discrepancies that I'm talking about that you've really got to wrestle with are those discrepancies that go to the heart of the case, that is, the central basic issues you need to decide. Let's now talk about those.

First, who actually shot Mary Jane Stout? The State offered the testimony and we told you in our opening statement that we would offer testimony that this defendant shot Mary Jane Stout after John David Stumpf shot Mr.

Stout, panicked and dropped the gun. The State offered the testimony of James Eastman. Now, James Eastman is not a pillar of this community. He is an admitted previously convicted criminal. He is presently an inmate of the Guernsey County Jail awaiting trial on charges pending against him. Be that as it may, he testified that as he was living, if you will, living with this defendant in the same cell that this defendant talked to him about this case, perhaps misplaced confidence in Eastman, but in any event Eastman told you from the witness stand what this defendant told him about what happened [3045] at the Stout residence the night of May the 14th of 1984. Recall, if you will, Eastman said that Wesley told him that Stumpf shot Mr. Stout, that Stumpf dropped the gun and panicked that he, himself, Wesley, picked up the gun and shot Mrs. Stout and as he was beginning to leave he heard her moan or cry out and went back and shot her a second time; that they went over to Pennsylvania, met up again with Stretch Edmonds; Edmonds made a comment to him that he had shot somebody at a gas station and this defendant said, well, that's alright the two people in the house are dead, I didn't leave any witnesses That was the testimony of James Eastman.

The defendant, Wesley, took the stand and as you heard, he denies this. The same sequence of events but he says Stumpf did the shooting. Why should you believe Eastman? You may not like James Eastman and maybe I don't like James Eastman but the question is not whether we like him. In any case you take your witnesses where you find them. If you could start out ahead of time and pick who you wanted to testify in a case you would choose [3046] substantial citizens but that's not the way the world goes around. Substantial citizens usually aren't in a position very often to be witnesses to a commission of a murder. The question really is not whether James Eastman is a criminal, it's a question did he tell the truth. Did he tell the truth when

he told you what Wesley had told him when they were cellmates and when they had each other confidence.

Now then, consider on the other hand the credibility of the defendant who denies that he shot Mary Jane Stout. Who has the most at stake in the outcome of this trial? I submit it's the defendant. Who is the most vitally interested in the defendant's acquittal of the charge of aggravated murder and attempted aggravated murder? It's this defendant. He has cleverly admitted to you the three lesser charges in this indictment in an effort to support the argument that I have admitted the extent of my wrongdoing but now I'm denying to you the two more serious charges to give strength to that denial. I submit to you the defendant had very little choice in admitting those three lesser charges because he knew we [3047] had him cold.

The gun that was recovered from his person of his bedroom in Texas, State's Exhibit "N", matched a bullet fired into the mattress of bedroom number "1". He was identified by Mr. Stout and by Edmonds as being one of the two persons who went to that house that evening of May 14. He sold a gun, the 357 magnum revolver from that house to John Dino. We found the gun. So, given all of that, how could he deny being there? How could he deny that he was armed and how could he deny that he stole something? So, he admitted that. He admitted those three crimes, theft of the motor vehicle, theft of the firearm and aggravated robbery, to give strength and credence to his denials that when I do--the argument is going to be, I can foresee it, I've admitted my part when I do wrong. I admit it, but I'm denying the rest. But consider, if you will, his position in this trial as to his credibility. Who has the most motive, if you will, to twist the facts to get himself off the hook?

On the same question, though, I'd like to point out to you that the testimony of Norman [3048] Stout, himself, has

some significance in my judgment. You will recall that Norman said as he rushed Stumpf he was shot, the last he saw at that moment was that his wife was seated on the bed, that he knocked Stumpf across the hall and into bedroom number "1". He doesn't recall at what point exactly he received the second shot but he recalls being on the floor after he regained his senses to some extent, he heard a conversation between the two male persons and then heard four reports that he now believe were gun shots. Mary Jane Stout was shot four times.

Now, is that consistent with what Wesley would have you believe? His testimony was that he was rummaging through the closet gathering up the guns he was going to steal in bedroom number "1" when he heard rapid fire and then Mr. Stout confronted him and that the second shot of Mr. Stout was fired in that bedroom number "1" that he didn't bother to look in bedroom number "2" from where those shots had apparently come he described but as they were leaving he looked in that bedroom number "2", saw Mary Jane Stout lying on that bed already [3049] shot when he says Stumpf went back into shoot her the second time.

The order of the shootings is important for you to determine. If you believe Norman Stout's version who was shot first and when those final four shots were fired, Wesley's not telling it the way it was. So, I say to you that Norman Stout's testimony corroborates the version of the facts of how these shootings occurred more so then Wesley and it does in fact corroborate what Wesley told Eastman, that Stumpf shot Mr. Stout, panicked, he dropped the gun and then this defendant shot Mrs. Stout. They had a conversation, if you believe Mr. Stout, and then the four shots were fired.

Why should you believe Norman Stout? Because he has nothing to tell you, no reason to tell you anything other than the truth of the tragic event in his life that he has no

particular reason to point the finger at any one particular person other than to tell you the truth.

Now, having gone through all that, I say there is ample evidence in this case from which [3050] you could conclude beyond a reasonable doubt that this defendant did in fact fire the fatal shots into the body of Mary Jane Stout.

Let's move on to what I consider to be the second disputed basic issue in this case. The question is one of the elements that the State must prove is that the defendant purposely or intentionally caused the death of Mary Jane Stout in order to prove aggravated murder or the attempted aggravated murder with respect to the wounding of Norman Stout.

First off, if you believe that the evidence has proven beyond a reasonable doubt that he fired the four shots into the body of Mary Jane Stout it seems to me you should have very little trouble finding out what his purpose was. I submit you can't argue that it was accidental discharge of the firearm when a person has been shot four times and he certainly wasn't intending to do her any favors, if he in fact shot her four times. I would say under those circumstances the purpose is very clear. But beyond that, Judge Henderson will instruct you, I believe, that purpose is a state of mind and since we can't look inside the head of an [3051] individual, particularly back at the time these events took place. What do we do to determine what his purpose was when those events took place? The only way we can determine the purpose an individual had in doing certain things while such certain events occurred is to look at what he did, how he went about it, the weapon or means used to do those things and all of the circumstances in evidence concerning those events as they relate to what was his state of mind.

Now, I think the Judge will also instruct you that you as the jury are permitted to draw an inference that a person intends the natural and foreseeable results of his voluntary acts. Now, let's look at it in that light. In this case both Stumpf and Wesley went to that house armed with a loaded firearm for the purpose of committing a felony, an unlawful act. Wesley admitted on the witness stand that it was foreseeable that under those circumstances that death or injury could result from the fact that they had those loaded guns. He admitted from the witness stand that those guns were for the purpose of subduing the [3052] people and terrorizing and coercing them into doing their will. When asked what was he going to do if they resisted he said, well--or to keep them from reporting the theft of the car to the police department, he said tie them up. Well, why didn't he? Did you hear any testimony at all about anybody trying to tie anybody or gag anybody or lock them in the bedroom or whatever? No, all you heard was that continuously one or the other of them, Stumpf or Wesley, had a gun on Mr. and Mrs. Stout. He testified he had his gun out at all times. He even shifted it from his right hand to his left hand as he gathered up the things he was stealing from the closet. It has been admitted that with those loaded guns they went there for the joint and common purpose to commit that felony, knowing someone was likely to get hurt or worse and another thing which I think has a considerable significance on his state of mind on the evening of May the 14th is the Belmont County incident. By his own admission he admitted that as they passed a car, a complete stranger at random, it could have been anybody, as they passed a car he pointed that [3053] nine millimeter automatic out the passenger's window, aimed it at the driver's window and fired the gun, again trying to say I didn't intend to hurt anybody. Does that make sense? If I submit to you that if I have a loaded firearm and I aim it at you and fire it, I'm not intending to do you any favors with that gun, does that not clearly indicate to you what his state

of mind was on May the 14th as he traveled to Ohio with guns?

Now, Judge Henderson will also instruct you in substance--I don't presume to quote him verbatim, that you may infer on the part of this defendant but are not required to a purpose to kill by reason of the fact that he and John David Stumpf entered upon a joint venture, a common scheme or design to commit a crime while armed and by violent means and the person is killed during the commission of that intended crime while they were armed, that you may infer from those circumstances a purpose to kill.

Now, in conclusion on that point, I would say to you that I believe if you fully and fairly consider all of the evidence in this [3054] case and you draw all of these reasonable inferences from that evidence as to what the defendant's conduct as revealed by the evidence reveals on the question of his state of mind at the time he did those things, I think you'll find an ample basis upon which you can conclude beyond a reasonable doubt that Clyde Daniel Wesley did act that night with a purpose to kill someone.

I believe the Judge will also instruct you that the purpose to kill under the foreseeability aspect, that is, foreseeable for someone to likely be killed he doesn't have to foresee the exact nature of the injury or the specific person as long as the situation and his conduct was such that it was foreseeable that a death or serious injury was likely to result. I think the Judge will talk to you about that.

Now, back to aider and abettor. I mentioned to you that even if you have doubt about whether or not this defendant Clyde Daniel Wesley fired the fatal shots into the body of Mary Jane Stout and it's clear that he did not fire those bullets into the head of [3055] Norman Stout that nevertheless he's been proven guilty of both of the crimes of

aggravated murder and attempted aggravated murder as an aider and abettor and is equally guilty as if he had fired those fatal shots.

Now, let me explain. I believe the Judge will instruct you that if two persons enter upon unlawful course of conduct, a common scheme or design and one person aids, assists, encourages or helps another person to commit those crimes then the person who aids and assists is equally guilty with the principal offender even though he did not commit each and every act to complete the crime.

Now, in this case if you find from all the facts and circumstances of this ease that that night at the Stout residence this defendant had a purpose to kill and that he with such purpose aided, assisted, helped or encouraged John David Stumpf to commit aggravated murder or attempted aggravated murder then Clyde Daniel Wesley is equally guilty as though he had fired the shots. In other words, although there is evidence, as we've talked about, from which you could conclude that he did fire [3056] the shots into the person of Mary Jane Stout nevertheless the State does not have to prove that in order for you to find him guilty of aggravated murder as an aider and abettor in the commission of that crime or those crimes. Now, this idea, this concept, this legal principle provision of the law of aider and abettor applies equally to the first and second specifications to the charge of aggravated murder.

All right. Let's put it together. Specification one says that the crime was committed in order for the purpose for avoiding arrest, detection, etc. of the crime of aggravated robbery. Putting the aider and abettor concept in there, if you find that he acted with purpose to kill then if he aided and abetted another person to purposely kill for the purpose of escaping detection then he's guilty of that specification. We

need not prove that he fired the fatal shot for him to be guilty of specification one.

Specification two says that the crime was committed during the course of conduct which involved the purposeful killing or attempting [3057] to kill two or more persons. Again, if the purpose to kill aiding, assisting, encouraged or helped another person to engage in a course of conduct involving the purposeful killing of two or more person or attempting to kill he is guilty of specification two whether or not he fired the fatal shot.

Now, specification three is different. Specification three requires that you find that he was the principal offender. That is, the specification that says that the killing was during the course of an aggravated robbery and that he was the principal offender but it is only as to specification three that you must find that he was the principal killer.

Now, did he participate in these crimes? Going back once again. Both of those people went there with loaded firearms. By his own testimony he restrained Norman Stout in bedroom number "1" to prevent him from having access to the guns on the bed which enabled, without any problem, Stumpf to shoot Mr. Stout a second time - physically restrained Norman Stout, held him. All right. He made no efforts to stop Stumpf from carrying out or [3058] completing the crimes. He made no effort to render assistance to either of the victims. Finally, there were two people with guns in that house, both guns were fired. Only one gun hit anybody but both were fired. Wesley's gun was fired in bedroom number "1", the bullet entered a downward path into the mattress. What was his story? He dropped the gun and picked it up off the floor but he never did fire it. You heard the ballistics expert that that bullet, Exhibit "J" I believe, was fired from Wesley's gun. If he dropped it on the floor it's impossible for it to enter that mattress on a

downward flight in the direction you heard it described. I believe Deputy McCauley said the track of the bullet was generally in this direction. The bed had not been ajar directly from the direction of the hallway door and in a downward flight into the mattress. There's no possible way that firearm could have accidentally discharged when it hit the floor at a level lower than the bed. So, if both of those people were in there shooting at people and trying their level best to hit them with a bullet, I submit to you [3059] they're equally guilty of the results of those shootings even though perhaps only one of them was successful in hitting anybody. They were both trying their level best.

I submit that at the very least the evidence proves that Clyde Daniel Wesley was an aider and abettor in the crime of aggravated murder because of his participation at least in the second shot by his own admission in the attempted aggravated murder of Norman Stout and as an aider and abettor under the law he's equally guilty the same as if he fired each of those shots into Norman Stout and each of those shots into Mary Jane Stout.

Now, I believe the Judge may instruct you that it makes no difference what disposition may be made of the Stumpf case, whether or not he was convicted as an principal offender or as an aider and abettor as to the results of your decision in this case.

If you find from the evidence in this case that he was either a principal offender, that is, Wesley, or an aider and abettor beyond a reasonable doubt then you should return a verdict of guilty.

[3060] I guess I've talked probably longer that I intended. Let me say in conclusion that I ask only that you fairly and fully consider all the evidence in this case. Listen to and apply the law as the Judge will give it to you,

particularly the matters of foreseeability, joint design, common design, aider and abettor which will be generally, if not precisely, in accord with what I've given you. Listen to all that. Apply that law to the facts as you find them to be, let the chips fall fairly and squarely where they may and to render a verdict that is just in this case, keeping in mind, however, that justice is a two-way street; justice not only for Clyde Daniel Wesley but justice also for Mary Jane Stout who died at the age of 54 last May; justice for her husband, Norman Stout, whose life will never be the same because of the tragic events in his house on May the 14th. I'm confident that if you do this, consider all the evidence and apply the law fairly and squarely to it you will reach verdicts of guilty as to each count and as to each specification of those counts, keeping in mind your job as to counts three, [3061] four and five.

I'll sit down for now. I will have an opportunity to talk with you a little later. I thank you for your attention. I would ask that you give Mr. Brown the same courtesy that you've given me. Thank you.

THE COURT: Gentlemen of counsel, I think at this time it would be a good idea if we stood up and stretch a little bit and moved our arms and muscles and then resumed our seats for the second chapter of the final argument.

MR. BROWN: Thank you, Your Honor.

May it please the Court, gentlemen of counsel, ladies and gentlemen of the jury, as Mr. Scott has indicated to you, this is the phase known as closing argument. It is the opportunity for us to outline in a similar manner to what we told you in opening statement we thought the evidence would show and now to outline in perhaps a mental checklist help you formulate, help you decide what the evidence did show; for us to show you what we believe the evidence did show.

Now, Mr. Scott indicated here today and

* * *

[3169] Boney, Sue Seley and Joanne Wade. Mrs. Cone, if you'll come forward or where you sit you're going to administer this oath?

(Whereupon, the above named individuals were administered the oath of sequestration.)

THE COURT: Thank you Mrs. Cone. The special Bailiffs and Court Constables then may desire to leave the courtroom or you may stay in the courtroom for the remainder of the proceedings. Thank you Mrs. Cone. If you wish, you may certainly leave. You certainly may stay, also.

Ladies and gentlemen of the jury, I took the opportunity that was afforded at this moment to prepare that order and to have the special Bailiffs and Constables present in court and you will hear more of their duties and you will see more of them from time-to-time. At this time, though, I have interrupted the proceedings insofar as the final argument is concerned. The State of Ohio began its final argument that was followed then in proper order by Mr. Brown for the defense and now Mr. Scott you may present the second phase of your argument or summation.

MR. SCOTT: Thank you, Your Honor. If it please the Court, [3170] gentlemen of counsel, ladies and gentlemen of the jury, I feel really rather certain that you are somewhat overwhelmed by all of the things that we've talked about up to this point so I don't intend to--I'm sure it will make you happy, to rehash every scrap of evidence that was heard in this case. You heard that evidence. My impressions are somewhat different from those of Mr. Brown but I trust your

good judgment and recollection. Keep in mind at the outset here, as I told you before, the critical time period of what happened in this case at that house is about three to four minutes from the time the shooting started til the time the shooting ended. That's what we're really down to. All the rest of it, everything that Mr. Brown paraded in front of you by stipulation or otherwise they knew we were going to get in evidence in through Texas officers. They knew we would get the evidence in through the Pennsylvania people. So, they simply stipulated it and made it easier and I appreciate that. It's not their generosity. They knew we could put that evidence on and get it in front of you. But all of those things focus down to two or three or four critical [3171] minutes when those shootings took place. Keep that in mind. Also keep in mind that we are down to three--I've heard nothing to change my mind, we are down to three basic issues in this case. Who shot Mary Jane Stout? Did this defendant have a purpose to kill at any time during the course of those events, as we'll talk about that a little more? And thirdly, if you have a problem with the proof that he shot Mary Jane, is he nevertheless involved as an aider and abettor under the law that he's equally guilty?

The Judge is going to charge you that if two people by common scheme or design set out to commit a crime each one is equally guilty with the other even though neither one committed every act constituting the offense. That's what aider and abettor is all about. Keep those things in mind.

Now, I do want to comment on two or three things that Mr. Brown brought up. He made quite a ta do about Edmonds' testimony and I don't understand why because everything Edmonds testified to the defendant, himself, confirmed that they did in fact get out of that car with [3172] a gun each of them, Stumpf and this defendant, for the purpose of going down there to steal something and that's all Edmonds really testified to. But keep in mind, also, that had

it not been for Edmonds at the outset in Texas identifying this defendant and identifying Stumpf, this case would never have been solved. We have a man from Pennsylvania, transients, a man from Pennsylvania and a man from Texas. If Edmonds would have kept his mouth shut this case would never, never have been solved. Keep that in mind also in considering what happened to Edmonds. Edmonds is not going to walk away. Edmonds is going to do 7 to 25 years for his involvement and the only involvement that we've heard from the witness stand other than somewhat speculative things is that he may have walked down into the garage and was ordered to get back out of there. Okay. That's far removed. Mr. Brown would have you believe that the involvement of Edmonds is the same as the involvement of this defendant. Far removed, I would say. So much for that.

The location of the shell casings. Perhaps, perhaps we learned a lesson. We always learn from doing things. It would have been better to [3173] marked each one where it was recovered, mark it out there and so on. It wasn't done. But I submit to you, use your good common sense, that you fire from an automatic pistol those shells are ejected, they're going to go anywhere. So, everybody agrees that the shooting of Mrs. Stout took place in bedroom number "2". Naturally we know there were at least five shots fired in that bedroom because four of them hit Mrs. Stout and one went in the wall. So, naturally there are at least five you would expect to find in there. Now, as far as the one in bedroom number "1", Mr. Brown would lead you to believe that's the only shot that was fired in there. It's not true. His own defendant admitted that and as he grabbed Mr. Stout to turn him around to keep him away from the guns on the bed Stumpf came in and shot him in bedroom number "1". That's one shot. Now we don't know whether the gun was pointed in this direction or this direction. It's conceivable that's the bullet or that's the cartridge over by the wall. However, there was another shot fired in that bedroom and that's the one that we have all the

geometric designs, but I don't care. I don't know much about geometry [3174] because I never did much in school, but be that as it may, I'm smart enough to know if that bullet entered the top of that mattress at a downward flight it wasn't discharged when it hit the floor. That gun was fired. The defendant conveniently says he didn't fire it, doesn't know how it got there. They'd be very happy if it wasn't there but there were at least two shots fired. Where's that other shell casing? It proves my point that they could go anywhere. The location of the shell casing doesn't necessarily have anything to do with where that gun was fired. All right. That's one thing.

The pathologist. The scientific evidence Mr. Brown says exonerates his client. What did the pathologist say? He said that he could not state the order in which those wounds were received. Granted, the bruising in the left breast area would indicate that there was some blood flow after that impact. Recall if you will, the pathologist said that she could have lived, if you call death the stopping of all body functions including the heart, she could have lived up to fourteen minutes is what he said. And I believe I asked him on redirect examination [3175] could that bruise have developed in that period of time and he said yes. So, it doesn't necessarily mean that that non-fatal shot was received first. However, assuming that it does, let's assume for the sake of argument that those two non-fatal shots were received first, how does that exonerate this defendant? Because what he told Eastman that there were shots fired and then they went back and shot her again. Only what he told Eastman was that he, himself, did it. Now he's saying Stumpf did it. So, the manner in which they were inflicted, that is, there was a return to the room, if you assume that's so, you're right back to square one. You either believe Eastman or you believe this defendant. Scientific evidence does not exonerate this defendant in that respect. Keep in mind, also, that the County Coroner did not do the autopsy. He referred it

to be done by Dr. Arejola and Dr. Arejola did not fill out the Coroner's report. He never even saw the Coroner's report. What is instant death? If I submit to you in a manner of speaking if you have two bullets fired into your brain and death is inevitable even though your heart may pump for [3176] up to fourteen minutes she have you died? There's nothing to be done to stop the natural course of events. The body just stops. Perhaps that's what the Coroner had in mind. He wasn't here to explain what he meant by instantaneous death but that wasn't the pathologist's language. That was Dr. Larrick's report. So, the scientific evidence does not exonerate this defendant.

Now, why would the defendant, assuming that what he told--let's talk about what he told Eastman. He said that Stumpf shot Mr. Stout and panicked. That's pretty much what Mr. Stout said as well, and dropped the gun and that he, that is, Wesley picked the gun up that Stumpf had dropped and shot Mrs. Stout. All right. What would lead you to believe that might be true or that that is true? Well, there's testimony which wasn't mentioned by Mr. Brown from Ron Dye that this gun of Wesley's jams because of the clip doesn't fit right. It's loose and it slips. The next round won't go into the chamber. That gun was fired in bedroom number "1", that bullet went into the mattress and you'll have that with you too. It had been fired once. Did it jam? Is that why he picked up the chrome [3177] gun? That's consistent. And I refer back once again to Norman Stout's testimony as he lay there in bedroom number "1" shot, unable to move, unable other than crawl around he heard a conversation between two people and then heard four shots. Is that not consistent with what Eastman said Wesley told him, that the man was shot, he picked the gun up and shot Mrs. Stout and he did go on and say she cried out and moaned and he went back and shot her again. Pretty consistent with what he's saying happened only he shifted gears and now is saying Stumpf did the shooting. You're just back to square one.

You're going to have to decide which of those is true as far as who shot Mrs. Stout. Let's talk about purpose to kill again. Mr. Brown would lead you to believe that the defendant admitted his Belmont County problem just to get everything off his chest, that he's an honest person and if he does wrong he wants to fess up to it. Perhaps. Perhaps. But I submit to you and he says it has nothing to do with this case. I submit it has a great deal to do with this case. It shows that he's not afraid or reluctant to shoot somebody, a passing motorist, that he [3178] didn't know by his own admission true or not that he wanted to steal his car, force the man off the road and steal his car. He didn't stop fast enough so he shot him. He shot him and he now knows he shot him in the head. The car wrecked. We don't know how he is now. Doesn't that show you a great deal about his state of mind, his propensity for violence? Having done that they say you do it the first time perhaps the second time is easier. Having done that he joins with Stumpf in a common design, if you don't like that word, joint venture, unlawful, felonious adventure to go to that Stout residence again armed with a loaded firearm, both of them. They went down there, he conceded to me on cross-examination, yes, with loaded guns it's foreseeable somebody's likely to be hurt or worse. Nevertheless they did so. Why did you have the guns? Well, to make them do what we wanted to, terrorize and coerce them is what he said, to subdue them, I think is what he said. I said what were you going to do if they resisted? Well, we could subdue them but nevertheless they had those guns out at all times during the course of this thing. Do you have any real doubt in your [3179] mind that he participated in those events? He hold Norman Stout by the arms, he got up and stood up right there and said I held him and turned him around in that bedroom "1" so that he couldn't get to those guns and that's when Stumpf came in and shot him. Is that not aiding or assisting Stumpf in an effort to kill Mr. Stout? There were two people in that house with handguns, both of those handguns were fired. I don't care if it was a ten degree angle or a 95 degree

angle, that gun was fired in that bedroom for a purpose. Given a situation like that where you're in the middle of an armed robbery, aggravated robbery and one of your victims decides not to cooperate and try to, wisely or not, resist and he knocked him aside to the point where he says he dropped his gun, you're faced with a problem and you shoot. Why are you shooting? Why are you shooting and what is your purpose at the time you shot? I submit even though only one gun fired any bullets that hit anybody, both guns were fired and both guns were fired for a common purpose, that's the purpose to kill at that point. Maybe, maybe at the time this thing started out he didn't [3180] have the intent to kill but that's not the question as they walked down the bank or as they walked up to that door and said we've got car trouble and all that. Maybe not. But the question that you have to resolve is what was his purpose at the time the shooting occurred, not before.

Talk about the demeanor of a witness, I have never seen as cool a customer as this man. No remorse. Even admitted his first concern after two people are shot was to gather up those guns because he wanted to steal them, he handled them carefully so they wouldn't get scratched. The thought never occurred to him to see if he could assist those people. Never occurred to him He mentioned something about well, I said what were you going to do if they to try to stop them from reporting this stolen car? Going to tie them up. Well, why didn't they? Why did they keep their guns drawn at all times in that house on those two people at their mercy? Somebody said, well, he said, Don Brown said, why didn't she get up and run. Can you imagine the terror in that poor lady's mind? She's been subjected to gun point for a half and hour or so, she's [3181] been herded back into the bedroom, she's seen her husband shot in front of her eyes, what would you do? I don't know what I would do but I think it's very reasonable that I might just do what she did,

apparently nothing, frozen. Is that an unreasonable conclusion?

Mr. Brown is doing his level best to divorce Clyde Daniel Wesley from John David Stumpf but it won't wash. They went there together for the admitted felonious purpose of stealing committing an armed robbery, if you will, a theft while armed understanding and recognizing the dangers of loaded firearms under such circumstances and the possibility foreseeability and the Judge will talk to you a little bit about that, death was likely to occur yet he wants this jury, wants you folks to believe he was just a bystander and just as I anticipated I'm an honest good ole boy, I'll admit when I do wrong. I did wrong by going there with a gun to commit a theft. I did wrong by stealing a gun and I did wrong by stealing a car but since I didn't do those other I'm not admitting it. That's what they're asking you to believe. I submit to you, you give a little in an effort to save a lot. That's what [3182] amounts to.

James Eastman has been raked over the coals, perhaps he deserves it. But the question, again, is not whether he's a nice guy or why he testified or why he told Mr. VanHorn what he had heard. Perhaps it was to save his neck. Maybe he thinks he'll get a break. No testimony that he has. I can tell you that he hasn't. But that's not the point. The point is not why he testified. The point is did he testify truthfully. Recall if you will at least as I understood it, Mr. Brown would have you believe that there was no conversation between the two of them yet the defendant admits there was a conversation, finally. First he said I just summarized from the transcript of the other trial then when he found out that some of the things about the lady moaning and going back and shooting her a second time was not in that transcript and then he said, well, maybe I added some things from my own knowledge, maybe he did, at least talked to him. The question is did he tell him what Eastman told you he told

him. That's the question for you. The scientific evidence does not answer that question for you. She could have died from any one of [3183] those shots in any order. That is, the two head shots in any order and the bruising would have occurred but assuming it didn't it's still consistent with what Eastman said this man told him as well as the story the defendant told you.

Keep in mind what I said to you before, you're going to have to conclude from all of the evidence the manner in which this defendant conducted himself, the weapon he had and used, fired in the--he said it was never out of his hand except when he dropped it and picked it up so it was fired, he had to fire it. He's not admitting it but he had to fire it. He fired it in a downward trajectory ten degrees, fifteen degrees, whatever, I'm smart enough to know it entered the top of that mattress and not the side of it, it had to be going down. If it fired from above you don't do that and it was fired generally from that doorway. Did he take a shot at Mr. Stout when he was confronted with him there? Now he didn't want to, like he said, I didn't really mean to shoot that man in Belmont County. I just pointed the gun at the driver's window and pulled the trigger but I didn't really mean to hurt him. That's what he's having you [3184] believe here now. I won't belabor the point.

Do not be sidetracked into minor details that really don't make much difference. For example, whether the hood of the car was up or not. This man admitted the hood of the car was up and Edmonds' testimony they've tried to challenge that but the man admitted this defendant admitted that the angle of the bed, so what. Those things are smoke screens to divert your attention from the three things, as I see it, that you really need to decide. Who shot Mary Jane Stout. Did the defendant by his actions indicate what his purpose was, purpose to kill. I submit there's plenty of evidence of that. And, thirdly, if you have a problem in doing the

shooting, did he nevertheless participate with another in the commission of the crimes as an aider and abettor as the Judge will tell you about. If he did, he can be found--he should be found guilty of all crimes and all specifications but one and that's the third specification to the aggravated murder which he must be found to be the principal offender. Every other charge the State does not need to prove that he fired that fatal shot into Mary Jane Stout's body. [3185] If he was there with the purpose to kill and he aided, assisted, encouraged, the Judge will tell you about that, another person to do that and that person did in fact do so he's guilty. Classic example, a person who drives the getaway car to stick-up a gas station, stays in the car, death occurs, he can be guilty of murder, aggravated murder because he participated in the unlawful felonious common design with other persons with a purpose to do so. That's what we have here. I won't belabor it any more.

I appreciate your attention. It's up to you now. I'm sure you don't want to hear all the evidence from my point of view because you heard it before. Let it fall where it will.

One comment. You probably will be instructed with regard to the first count, the aggravated murder count, that if you first find that the State's failed to prove the charge of aggravated murder you will then go on and consider the lesser charge of felonious assault but only if you first find the aggravated murder has not been proven beyond a reasonable doubt, which I can tell you that the Judge will tell you that your obligation is to fully and fairly consider

* * *

IN THE COURT OF
COMMON PLEAS
IN AND FOR THE FIFTH
DISTRICT COURT OF
APPEALS, GUERNSEY
COUNTY, OHIO

STATE OF OHIO :

Plaintiff, :

vs. : CASE NO. 9692

CLYDE DANIEL WESLEY :

Defendant.: PART IV

Transcript of the Proceedings held on April 8, 9, 10, 11, 12, 15, 17, 17, 18, 22, 23, 24, 25, 26, 27 and May 2 and 6, 1985 before the Honorable John E. Henderson, Judge.

APPEARANCES:

C. Keith Plummer
James R. Scott
Prosecuting Attorneys
139 W. 8th St.
Cambridge, OH
For the State.

Donald D. Brown
Sam R. Raptis
Attorneys at Law
Guernsey Savings & Loan Bldg.
Cambridge, OH
For the Defendant.

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1985 DEC 2 AM 9:02
CLERK OF COURTS GUERNSEY COUNTY

* * *

[3186] the evidence. Excuse me, I meant involuntary manslaughter. Involuntary manslaughter, you will be instructed on involuntary manslaughter, as a lesser offense. You can not and should not consider that lesser charge until you decide or if you decide that the principle charge of aggravated murder has not been proven. Your obligation is to consider that charge fairly and fully and not to take the opportunity to consider the lesser charge to avoid the aggravated murder charge. The Judge will tell you about that too.

I thank you for your attention. I appreciate it. Let the chips fall where they will. Carefully consider all of the evidence. Keep in mind the only person on trial in this courtroom is Clyde Daniel Wesley. It's not Norman Leroy Edmonds and it's not John David Stumpf. The penalties imposed in those cases have nothing whatsoever to do with this case. It's up to you to determine what this defendant has been proven guilty of and to return your verdict accordingly. Thank you.

THE COURT: Ladies and gentlemen of the jury, that concludes the final arguments now. The next part in this

* * *

IN THE STATE OF OHIO :
:
COUNTY OF SCIOTO :

AFFIDAVIT

JOHN DAVID STUMPF, being first duly sworn according to law, states the following:

1. I was represented by Lewis Tingle and Craig Stephens at trial.

2. I talked to Mr. Tingle pretty often, but I only really talked to Mr. Stephens one time prior to trial.

3. My family originally tried to hire Mr. Tingle after he was recommended to us by Lt. Van Horn. We did not have enough money. Later he was appointed to represent me by the court.

4. I saw Mr. Tingle fairly often. We mostly talked about my case. Mr. Stephens was appointed later. I did not see Mr. Stephens very much.

5. We began to pick a jury for my trial. Then Mr. Tingle told me that a police officer had been shot and killed. He told me to waive the jury so I could get a trial to judges who would be more fair. I did not know how the judges would be picked.

6. Mr. Tingle did not talk to me about a plea until a few days before my trial was scheduled. He was the only lawyer present when we talked about the guilty plea.

7. I saw my family often while waiting for my trial to begin. They were not there when I made my plea. I was not able to discuss the plea with them prior to its being made.

8. The only time I really remember talking to Mr. Stephens was when Mr. Stephens told me that he had hired an investigator to find out what had happened in Canonsburg.

9. Mr. Tingle told me that I should plead guilty to the reduced charges. I thought that the specifications that were dropped meant that I could not get the death penalty.

10. We were going to start the trial before the three judge panel. After the recess I was told to plea. I asked my lawyer what he was talking to the prosecutor about. He said it was none of my business. He brought some papers into the room and told me that the prosecutors were dropping the specifications.

11. Mr. Tingle told me that I would not get the death penalty. I did not understand all legal terms. Mr. Tingle told me to look at him if I did not understand or know how to answer a question and he would indicate how to answer.

12. During the plea, I would look at Mr. Tingle when I was not sure what to do. He would indicate whether I should answer yes or no by nodding or shaking his head.

13. I did not understand the nature of the charges to which I was pleading.

14. At one point the judges asked me if I was in fact guilty. I wanted to explain myself. Mr. Stephens then answered for me.

15. I did not think that I was pleading guilty for personally killing Mrs. Stout.

16. I did not understand the purpose of the hearings after my plea. I did not know that I would go through a trial. Mr. Tingle told me that it was standard procedure.

17. I never understood what mitigation meant. The lawyers did not talk to me about mitigation before my trial. I did not know who would testify. He did not ask me who I wanted to testify.

18. I thought the purpose of the hearing was to put on character witnesses.

19. After the sentence, I asked Mr. Tingle how I got the death penalty. He said we would win on appeal.

20. I met Clyde Daniel Wesley when I was ten or eleven years old. We knew each other very well.

21. We spent a lot of time together until we were fourteen or fifteen years old. Then Danny Wesley went to a boys' home in Newcastle.

22. I worked with Danny again a few years later. We worked at a tire store together.

23. I started to use drugs at age fourteen. I started to smoke marijuana and drink alcohol about this time.

24. I later began to use speed, quaaludes, acid, and later cocaine.

25. I never had to use drugs.

26. I smoked marijuana and drank alcohol every day. I used other drugs mostly on weekends.

27. I have taken up to eleven quaaludes at a time. Sometimes I had to miss work because I was high.

28. On the morning before this case happened I had had a hit of acid. I might have had a hit on the morning before we left to Cambridge. I do not remember how much beer we drank.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ John D. Stumpf
JOHN DAVID STUMPF

SWORN TO AND SUBSCRIBED before me
this 10 day of October, 1988.

/s/ David A. Doughety
NOTARY PUBLIC
Attorney – State of Ohio
My commission has no expiration date.

IN THE STATE OF OHIO :
: ss.
COUNTY OF LUCAS :

AFFIDAVIT

I, CHARLOTTE GILBERT, being first duly sworn according to law, depose and state as follows:

1) I was one of the social workers who assisted Lewis Tingle and Craig Stephens in preparing mitigation in the case of State of Ohio v. John Stumpf, CR-9684, Guernsey County, Ohio.

2) Debbie Starkey originally contacted me to assist her with Mr. Stumpf's case.

3) Debbie Starkey and I met with Mr. Tingle for the first time on September 6, 1984. Mr. Tingle gave us some information about John. however, the information Mr. Tingle provided about the actual offense was fairly vague.

4) On September 8, 1984, I reviewed the information provided to me by Mr. Tingle.

5) On September 10, 1984, I interviewed John Stumpf for the first time. I also met with Mr. Tingle, again.

6) On September 11, 1984, I went to Canonsburg, Pennsylvania and interviewed some of John Stumpf's family members, neighbors and teachers. I obtained John's school and hospital records.

7) On September 11, 1984 I spoke with Debbie Starkey by phone and prepared a questionnaire.

8) On September 12, 1984, I distributed some questionnaires in Canonsburg, contacted a few of John's employers, and two of John's friends.

9) On September 13, 1984, I spoke to several members of the Dino family and collected questionnaires. The same date, I discussed the case with Debbie Starkey and interviewed John's stepfather, mother and stepmother by phone. I also began writing a social history. On September 14, 1984, I completed the social history and met with the attorneys.

10) On Septembers 16, 1984, I met with Debbie Starkey. We reviewed questionnaires and prepared a witness list.

11) On September 17, 1984, Debbie Starkey and I met with Mr. Tingle. We reviewed the questionnaires and completed a witness list.

12) On September 19, 1984, Debbie Starkey and I met with Mr. Tingle and Mr. Stephens.

13) On September 20, 1984, I interviewed witnesses and assisted the attorneys in the courtroom.

14) It was my understanding that the social history was to be presented to a psychologist and that a psychologist would evaluate John Stumpf.

15) I did not feel that we had adequate time to properly investigate John's background.

16) Our time was cut even further when the attorneys decided that John would enter a guilty plea. The

decision was made because it was to "iffy" as to who had which gun.

17) John did not want to enter a guilty plea.

18) The attorneys, Mr. Tingle and Mr. Stephens, would tell John what to do. John would go along with whatever the attorneys told him.

19) The attorneys wanted certain information cut from the social history. They wanted no mention of drug and alcohol usage. The attorneys also did not want to present evidence of the relationship between Dan Wesley and John Stumpf, particularly about any past criminal involvement.

20) John's attorneys spent almost no time in witness preparation. On the day of the mitigation hearing, a large number of people came from Canonsburg to Cambridge to testify on John's behalf. Debbie Starkey, an assistant of hers, and I interviewed the witnesses. Mr. Tingle spoke to them briefly as a group.

21) The attorneys wanted older people to testify, such as John's friend's parents. They did not want anyone to testify who could relate any information about John's use of drugs and alcohol.

22) Debbie Starkey suggested that the attorneys call officers from the Guernsey County Jail to testify about John's adjustment to jail but the attorneys did not do this.

23) The attorneys were afraid that if they called too many witnesses, it would anger the judges.

24) When Mr. Tingle and Mr. Stephens prepared John for his unsworn statement, they focused on the facts. There were no discussions about John's feelings about the incident or his background.

25) I do not remember talking to John's natural father.

26) I do not remember obtaining records from the probation department in Washington County.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Charlotte Gilbert
CHARLOTTE GILBERT

Sworn to and subscribed before me
this 6th day of October, 1988.

/s/ Lora J. Beckwith
NOTARY PUBLIC
My comm. expires 6-13-90

IN THE STATE OF OHIO :
: ss.
COUNTY OF CUYAHOGA :

AFFIDAVIT

Scott P. Kenny, having been duly sworn and cautioned, states the following:

1) My name is Scott P. Kenny, and I reside at 20029 Sussex Road, Shaker Heights, Ohio 44122.

2) I am a graduate of Case Western Reserve University School of Law (1975).

3) I am licensed to practice law in the State of Pennsylvania (1975) and the State of Ohio (1976).

4) I was employed by the Ohio Public Defender Commission from 1979 until 1986, serving as Chief Trial Counsel for the last five years. My job responsibilities included the training and supervision of trial attorneys employed by the commission.

5) I have represented in excess of ten capitally indicted defendants under the present death penalty statute.

6) I have attended hundreds of hours of capital litigation continuing education programs throughout the county.

7) I have lectured on capital litigation and trial strategy subjects for continuing education programs in Ohio.

8) I have testified on the subject of effective representation in Ohio and Indiana.

9) In August of 1984 I was an employee of the State Public Defender Office.

10) I was notified by David Stebbins, also of the Public Defender Office, that Lewis Tingle's law clerk had contacted the office requesting assistance in the case of John David Stumpf.

11) I spoke with Mr. Tingle approximately a week prior to the start of trial.

12) Mr. Tingle told me that the decision had been made to waive a jury trial and try Mr. Stumpf to a three judge panel.

13) Mr. Tingle mentioned that he was considering a guilty plea to avoid the husband of the victim testifying at the mitigation phase.

14) I advised Mr. Tingle that the husband, Norman Stout, could not testify at the mitigation phase. However, should a guilty plea be entered, I further advised Mr. Tingle that the prosecution could and probably would have Mr. Stout testify at a hearing conducted pursuant to Criminal Rule of Procedure 11(C) (3) and R.C. 2945.06. Therefore, a guilty plea would render his strategy ineffective.

15) I believed that Mr. Tingle had decided to pursue a trial. I had explained to him that he had a good chance to prevail on some important issues and avoid the death penalty.

16) I strongly advised Mr. Tingle to have the court appoint a behavioralist or psychologist to explain how Mr. Stumpf became involved in the incident. I told him that Mr. Stumpf had a right to such an expert.

17) The next time I talked to Mr. Tingle he told me that he had decided not to use a psychologist. He said that John did not suffer from a mental disease or defect.

18) I told Mr. Tingle that the help of a psychologist was necessary even though John was not suffering from a mental disease or defect.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Scott P. Kenny
SCOTT P. KENNY

SWORN TO AND SUBSCRIBED before me
this 10th day of October, 1988.

/s/ Karen L. Pallat
Karen L. Pallat, Notary Public
State of Ohio
My commission expires April 12, 1989

STATE OF PENNSYLVANIA :
: ss:
WASHINGTON COUNTY :

AFFIDAVIT

LESA WOOD, first being duly sworn according to law, deposes and states as follows:

1. I am John Stumpf's younger sister.

2. In 1984, when John's case was pending, I first met Mr. Tingle, John's attorney, when I visited John at the Guernsey County Jail. When we were introduced, we did not discuss anything about John's case.

3. The next contact I had with Mr. Tingle was when a group of John's family members and friends went to Cambridge to testify. We met at Mr. Tingle's mother's house. A social worker spent about five or ten minutes talking to us asking very general questions about John. I told the social worker about John's use of drugs and alcohol.

4. John's attorney told us that John could not get the death penalty because he plead guilty. We had completely erased in our minds the death penalty as a possibility. We knew John could get twenty or thirty years.

5. John told me that his attorney was not really explaining things but had said that the prosecutor would drop the smaller aggravating circumstances and he wouldn't get the death penalty.

6. I waited outside the courtroom but the attorneys never called me to testify. The attorneys never explained to me why I wasn't called as a witness. There were other people there that weren't called either, my

husband, Betty Beiletti, Darla Spiker, Helen Procacina and Tony Kohn.

7. I think the attorneys made a point of having mom testify last. I heard them tell her to give short answers, but the attorney didn't tell her what kind of questions he would ask.

8. Two weeks before trial I remember that the Dinos and my mom passed out and collected questionnaires to everyone who knew John. I thought the questionnaires were supposed to give the judges some kind of insight into the type of person John is. Then the attorneys told mom to get in touch with people who could testify for John.

9. When I visited John in jail, the officers treated John very well. When the family visited they would leave us alone. The officers didn't handcuff John when they took him to his attorney's office. They seemed to trust him. I was allowed to go into the jail to cut John's hair a couple of times. I don't remember any discussions about the officers testifying on John's behalf.

10. John is out-going. He would try to make you laugh before anything. John is always willing to help. It's just his nature. He is a good listener.

11. Punky raised us. He's my dad. Our natural father took us to Ohio a couple times in the summer. I think we all just blocked him out. I don't remember John talking about his feelings about our natural father's absence. I saw my real father for the first time in eleven years at John's sentencing.

12. Our family is pretty close. We did things together. There were some tough times financially, though.

13. My mom's dad died of alcohol consumption. She and Punky never kept alcohol in the house.

14. Danny Wesley is a quiet person. Some people would call him sneaky quiet. Punky never liked Danny. He didn't trust him.

15. John hadn't seen Danny for four years before they got into this trouble. Right before this happened, I saw Danny at the Stop-n-Go store. He was alone. Danny had a whole bunch of joints in a bag. I thought he was high.

16. When I visited Cindy and Danny in Oklahoma one summer we all went for a ride in their truck. Danny kept guns in the truck. As we were driving along Danny took out a big hand gun and started shooting out the window at trees. I was really shocked. This is the first time I had actually seen a gun fired. Danny had a little handgun in the house, too.

17. John dated a lot of women. He treated them well, but he never had a real committed relationship.

18. John started drinking when he was 16 years old. John smoked pot almost every day. One time Punky caught him with a bag of pot and threw him out of the house. John went to live with John Dino, Jr.

19. John was a silly drunk, not aggressive or violent. He was the life of the party. Alcohol and pot would bring him out of his shell. John used quaaludes about once a week. When he did them with alcohol, he was comatose. I think he has tried acid, too.

20. Everybody was doing drugs at the time. It was the thing to do.

21. John didn't have much interest in school. He just didn't apply himself. John was held back in seventh grade. I think this contributed to John's "I don't care" attitude about school. When we moved when John was in high school, John had to go to a new school. He didn't know anybody. I think this is part of the reason he quit.

22. John has a lot of friends and family who love him and miss him very much. John is applying himself now, doing what he should have done when he was in school. This trouble has matured John.

/s/ Lesa Wood
LESA WOOD

Sworn to and subscribed before me this 2nd day of October, 1988.

/s/ Michel A. Coconis
Notary Public
MICHEL A. COCONIS
Notary Public – State of Ohio
My commission expires Jan. 29, 1993

Supreme Court, U.S.
FILED
FEB 22 2005
OFFICE OF THE CLERK

(4)

No. 04-637

In The Supreme Court Of The United States

MARGARET BRADSHAW, Warden,
Petitioner,

v.

JOHN DAVID STUMPF,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
**Counsel of Record*
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
FRANKLIN E. CRAWFORD
Assistant Solicitors
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

1. Is a representation on the record from defendant's counsel and/or the defendant that defense counsel has explained the elements of the charge to the defendant, sufficient to show the voluntariness of the guilty plea under *Henderson v. Morgan*, 426 U.S. 637, 647 (1976)?

2. Does the Due Process Clause require that a defendant's guilty plea be vacated when the State later prosecutes another person in connection with the crime and presents evidence at the second defendant's trial that is allegedly inconsistent with the first defendant's guilt?

LIST OF PARTIES

The Petitioner is Margaret Bradshaw, the current Warden of the Mansfield (Ohio) Correctional Institution.

The Respondent is John David Stumpf, an inmate of the Mansfield (Ohio) Correctional Institution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE AND FACTS 4

A. During the course of robbing the Stouts, Stumpf and Wesley shot both Stouts, killing Mary Jane Stout 5

B. State court proceedings 6

1. Stumpf was indicted for aggravated murder and various other crimes involving the Stout slaying 6

2. Stumpf pleaded guilty in exchange for the prosecutor's agreement to drop two of the three capital specifications on the aggravated murder charge and the three robbery and theft charges 8

Page

3. During the plea colloquy, Stumpf admitted that his attorneys explained the charges to him 9

4. The factual basis hearing corroborated the plea 11

5. The court sentenced Stumpf to death 12

6. Wesley is convicted at trial 13

7. Stumpf moved to withdraw his guilty plea 14

C. Stumpf sought federal habeas relief 15

SUMMARY OF ARGUMENT 17

ARGUMENT 20

A. Stumpf's guilty plea was voluntary and intelligent 20

1. Stumpf's insistence that he was not the triggerman is consistent with his guilty plea to the aggravated murder of Mrs. Stout 21

2. Stumpf's plea was voluntary and intelligent under *Henderson v. Morgan*, as the record confirms that Stumpf's attorneys explained the elements of the charged offenses to him 27

Page

B. The Sixth Circuit's "inconsistent prosecution" theory fails on both the facts and the law 35

1. The theory at Wesley's trial was not "inconsistent" with Stumpf's plea 35

2. Stumpf cannot use federal habeas to collaterally attack his guilty plea 37

3. The Sixth Circuit's decision conflicts with well-established precedent governing claims of prosecutorial misconduct and actual innocence 39

4. Stumpf cannot make an "actual innocence" claim, as no such claim exists in habeas, and, in any event, Stumpf is not actually innocent 42

C. The Sixth Circuit's newly minted due process right poses a serious threat to the finality of guilty pleas 45

CONCLUSION 47

APPENDICES 1a

Appendix A: Constitutional Provisions 1a

Appendix B: Ohio Rev. Code § 2901.22. Culpable mental states 2a

Appendix C: Ohio Rev. Code § 2903.01. Aggravated Murder 3a

Page

Appendix D: Ohio Rev. Code § 2923.03.
Complicity 5a

Appendix E: Ohio Rev. Code § 2929.03.
Imposing sentence for a capital
offense 6a

Appendix F: Ohio Rev. Code § 2929.04.
Criteria for imposing death or
imprisonment for a capital offense 12a

Appendix G: Ohio Rev. Code § 2945.06.
Jurisdiction of judge when jury trial
is waived; three-judge court 15a

Appendix H: Ohio R. Crim. P. 11(C)(3).
Pleas, Rights Upon Plea 16a

TABLE OF AUTHORITIES

Page

Cases

Alcorta v. Texas,
355 U.S. 28 (1957) 40

Blackledge v. Allison,
431 U.S. 63 (1977) 46

Bousley v. United States,
523 U.S. 614 (1998) 44

Boykin v. Alabama,
395 U.S. 238 (1969) 29, 31

Brady v. Maryland,
373 U.S. 83 (1963) 40

Brady v. United States,
397 U.S. 742 (1970) 29, 35, 38, 39

Brecht v. Abrahamson,
507 U.S. 619 (1993) 45

Enmund v. Florida,
458 U.S. 782 (1982) 11

Giglio v. United States,
405 U.S. 150 (1972) 40

Haring v. Prosise,
462 U.S. 306 (1983) 42

Page

Henderson v. Morgan,
426 U.S. 637 (1976) ..... *passim*

Herrera v. Collins,
506 U.S. 390 (1993) ..... *passim*

Jackson v. Virginia,
443 U.S. 307 (1979) 33

Kuhlmann v. Wilson,
477 U.S. 436 (1986) 45

Mabry v. Johnson,
467 U.S. 504 (1984) 19, 37, 38

Marshall v. Lonberger,
459 U.S. 422 (1983) 30, 32

McCarthy v. United States,
394 U.S. 459 (1969) 42

McMann v. Richardson,
397 U.S. 759 (1970) 21

Mooney v. Holohan,
294 U.S. 103 (1935) 40

Napue v. Illinois,
360 U.S. 264 (1959) 40

Schlup v. Delo,
513 U.S. 298 (1995) 43, 44

Page

Smith v. Groose,
205 F.3d 1045 (8th Cir. 2000) 17

State v. Ballew,
667 N.E.2d 369 (Ohio 1996) 23

State v. Cooey,
544 N.E.2d 895 (Ohio 1989) 7, 26

State v. Green,
738 N.E.2d 1208 (Ohio 2000) 26

State v. Scott,
400 N.E.2d 375 (Ohio 1980) 23

State v. Smith,
684 N.E.2d 668 (Ohio 1997) 8, 23, 36

State v. Wesley,
1986 Ohio App. Lexis 8651
(Ohio Ct. App. Sept. 22, 1986) 13

State v. Xie,
584 N.E.2d 715 (Ohio 1992) 14

Teague v. Lane,
489 U.S. 288 (1989) 45

Tison v. Arizona,
481 U.S. 137 (1987) 24, 27

Tollett v. Henderson,
411 U.S. 258 (1973) 21, 27, 30

Page

United States v. Broce,
488 U.S. 563 (1989).....29, 35

United States v. Dominguez Benitez,
124 S. Ct. 2333 (2004).....45

United States v. O'Dell,
805 F.2d 637 (6th Cir. 1986).....17

United States v. Ruiz,
536 U.S. 622 (2002).....29, 40

United States v. Timmreck,
441 U.S. 780 (1979).....20, 38

In re Washington,
691 N.E.2d 285 (Ohio 1997).....23, 24

Statutes and Rules

28 U.S.C. § 1254(1).....1

Ohio Rev. Code § 2901.22(A).....22

Ohio Rev. Code § 2903.01 22

Ohio Rev. Code § 2903.01(B).....22

Ohio Rev. Code § 2903.01(D).....22, 23, 24

Ohio Rev. Code § 2923.03(A).....7, 17

Ohio Rev. Code § 2923.03(F) 17, 22, 36

Page

Ohio Rev. Code § 2929.03(A).....7

Ohio Rev. Code § 2929.03(D).....7, 12

Ohio Rev. Code § 2929.03(F) 7

Ohio Rev. Code § 2929.04(A).....6

Ohio Rev. Code § 2929.04(A)(3).....7

Ohio Rev. Code § 2929.04(A)(5).....7

Ohio Rev. Code § 2929.04(A)(7).....8

Ohio Rev. Code § 2929.04(B).....7

Ohio Rev. Code § 2929.04(B)(6) 12, 34

Ohio Rev. Code § 2945.06 11

Ohio R. Crim. P. 11(C)(3).....11

Ohio R. Crim. P. 32.1 14

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Pet. App. 1a–58a. The United States District Court's unreported opinion and judgment denying the writ appear at J.A. 9–107. The District Court's order denying Stumpf's motion to alter or amend judgment appears at Pet. App. 92a–103a. The District Court's order granting a certificate of appealability appears at Pet. App. 104a–20a. The Ohio Supreme Court's entry denying jurisdiction of Stumpf's motion for post-conviction relief appears at Pet. App. 235a, the opinion and judgment of the Ohio Fifth District Court of Appeals affirming the denial of Stumpf's motion for post-conviction relief appears at Pet. App. 227a–34a, and the trial court order denying Stumpf's motion for post-conviction relief appears at Pet. App. 237a–41a. The Supreme Court of Ohio's published decision and order on direct appeal appear at Pet. App. 149a–77a. The opinion of the Ohio Fifth District Court of Appeals on direct appeal appears at Pet. App. 180a–214a. The trial court's entry denying Stumpf's motion to withdraw his guilty plea appears at Pet. App. 280a, the trial court's judgment on sentencing appears at Pet. App. 217a–21a, the trial court's order accepting Stumpf's guilty plea appears at Pet. App. 222a–26a, and the trial court's judgment entry finding Stumpf guilty of aggravated murder appears at Pet. App. 215a–16a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its opinion on April 28, 2004. The Sixth Circuit denied the Warden's Petition for Rehearing and Suggestion for Rehearing En Banc on August 9, 2004. The Warden filed a Petition for Writ of Certiorari on November 8, 2004, within 90 days of the Sixth Circuit's denial of rehearing. The Court granted the Petition on January 7, 2005. The Warden invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the appendix included with this brief. Unless otherwise noted, the statutes and rules cited in this brief are the versions that were in effect at the time of Petitioner's offense.

INTRODUCTION

John Stumpf pleaded guilty to the aggravated murder of Mary Jane Stout. Stumpf and his partner, Clyde Wesley, agree that one of them shot Mrs. Stout four times—three times in the head alone—killing her during the course of robbing the Stouts' house. Not surprisingly, though, they disagree about who actually pulled the trigger. Stumpf says Wesley did it, and Wesley says Stumpf did it. That uncertainty, while a central feature of the decision below, is largely, if not entirely, irrelevant to the legal issue this case in fact presents. But the court below combined that factual uncertainty with errant readings of both Ohio law and the Court's decisions to arrive at the remarkable conclusion that Stumpf's conviction, a conviction based on his guilty plea, violated the Constitution in two different ways. In fact, each of its constitutional theories is fatally flawed.

First, in holding that Stumpf's guilty plea was involuntary, the court below used an analytical framework inconsistent with the Court's decisions. On-the-record plea proceedings carry a presumption of regularity. As a corollary, where the defendant admits on the record that his counsel adequately explained the charges to which the defendant is pleading, or even where his counsel says that on the defendant's behalf, the burden falls squarely on the defendant, in his habeas action, to show that no such explanation occurred.

While the court below paid lip service to that proposition, the analysis it actually employed instead placed the burden on the State. In the face of unrebutted record evidence that Stumpf's counsel had provided adequate explanation, it found that the plea must not have been adequately explained. And in reaching that conclusion, it relied on a flawed reading of Ohio law. Essentially, the court reasoned that (1) the only theory the State was pressing regarding Stumpf's guilt of the aggravated murder charge was that he was the actual shooter, (2) Stumpf has always maintained he was not the actual shooter, hence (3) if he pleaded guilty it must be because he did not understand the charges. That reasoning fails, however, for the simple reasons that (1) substantial evidence shows that Stumpf *was* the actual shooter, and (2) in any event, his conviction for aggravated murder could stand even if he was not. That is, even if his partner, Wesley, actually pulled the trigger, Stumpf could still be criminally liable for aggravated murder under Ohio law. Once that misunderstanding is resolved, though, the entire syllogism collapses. Stumpf admitted that he received adequate explanation, and his conduct in pleading guilty was entirely consistent with that explanation having occurred.

Second, the Sixth Circuit's "inconsistent theories" due process holding fares no better. The court found that the State violated due process by using inconsistent theories in obtaining Stumpf's and Wesley's convictions, in particular that the theory in Stumpf's case was that Stumpf was the shooter, and that the theory in Wesley's case was that Wesley was the shooter. But the Sixth Circuit's theory fails both on the facts and the law. In fact, at Wesley's trial, the State argued in closing that Wesley was guilty *either* as the shooter *or* because he participated with Stumpf in the events that led to her death. Stumpf, on the other hand, pleaded guilty, so he never had a "trial" to establish his guilt. Nor does the claim fare any better on the law. The due process claim is, at root,

an attack on Stumpf's guilty plea, and the Court has long recognized that habeas cannot be used to collaterally attack a guilty plea, other than on voluntariness grounds. Even if Stumpf could get around that rule, and he can give no good reason to allow him to do so, no evidence here shows that the State did anything wrong. The prosecutor did not secure Stumpf's plea by concealing evidence, as the evidence about which Stumpf complains did not even exist at the time he pleaded guilty. Rather, Stumpf's complaint must be that, in light of the new evidence, the State was required to permit him to withdraw his plea. But that is merely a sub-species of an "actual innocence" claim (i.e., "the State cannot maintain this conviction because this new evidence shows I am actually innocent"), and as such it fails, both because the Court has long held that actual innocence is not a "freestanding habeas claim," and because the totality of the evidence overwhelmingly precludes Stumpf from establishing actual innocence here.

In short, Stumpf pleaded guilty and, as the dissent below noted, "got exactly the opportunities that he bargained for." The prosecutor dropped two out of the three capital specifications, reducing the likelihood that Stumpf would get a capital sentence, and also dismissed three of the five criminal charges. To be sure, Stumpf ultimately received a death sentence, notwithstanding the deal, but that does not provide him any basis to go back and challenge his plea. The Sixth Circuit was wrong to conclude otherwise.

STATEMENT OF THE CASE AND FACTS

The State of Ohio sentenced Stumpf to death for the role he played in killing Mary Jane Stout, a crime to which he pleaded guilty. This case involves his challenge to that plea.

A. During the course of robbing the Stouts, Stumpf and Wesley shot both Stouts, killing Mary Jane Stout.

On May 14, 1984, just after sundown, John Stumpf and Clyde Daniel Wesley walked up to the Stouts' house in rural eastern Ohio. They knocked on the door and, when Norman Stout answered, asked if they could use the telephone. Stout invited them in and allowed them to use the phone. Several times, while they were inside, Stumpf asked Wesley "Are you ready?" and Wesley replied, "Not yet." But when Stumpf asked again, Wesley said, "Now, yes." Stumpf Hr'g Tr. 305–06 (Factual Basis Hr'g) (Dist. Ct. R. 13).

Stumpf and Wesley then drew their guns and began robbing the Stouts. Stout testified that Stumpf marched Stout and his wife, Mary Jane, into a bedroom at gunpoint. He then held them there while Wesley ransacked the house, looking for items to steal. *Id.* at 310–12. Mr. Stout at some point moved toward Stumpf, and Stumpf admits that he then shot Stout in the head. *Id.* at 310–16; Stumpf Hr'g Tr. 502 (Sentencing Hr'g). The shot did not kill Stout, and, after a brief struggle, Stumpf shot him in the head again. *Id.* at 502.

As Stout lay on the floor grievously wounded, he heard two male voices talking, and then he heard four more gunshots. Stumpf Hr'g Tr. at 317–19 (Factual Basis Hr'g). Investigators later determined that Mrs. Stout was shot four times, and died from three bullet wounds to her head. *Id.* at 86–92. No one disputes that Mrs. Stout was shot and killed during the course of the robbery, although there is a dispute as to whether Stumpf or Wesley fired the shots.

Ballistics examinations confirmed that Mr. Stout and Mrs. Stout were both shot with the same gun, a .25 caliber handgun whose characteristics were consistent with that of a Raven brand firearm. *Id.* at 337–40. Mr. Stout, who was familiar with Raven handguns, recalled that he was shot with a chrome firearm, similar to a Raven .25. Stumpf was

carrying a Raven .25. *Id.* at 316. Wesley, by contrast, was carrying a black Armi .25. *Id.* at 260.

After completing the robbery, Stumpf and Wesley left the Stout house in Mrs. Stout's car with the guns and other items they had stolen, leaving both Stouts for dead. During the trip, Stumpf disposed of the Raven .25 by throwing it out the car's window. Stumpf Hr'g Tr. 503 (Sentencing Hr'g).

When picked up by the police, Stumpf originally denied any knowledge of the crimes. After finding out that Mr. Stout had survived, however, Stumpf changed his story, admitting that he shot Mr. Stout. Although Stumpf admitted to carrying the chrome Raven .25 and to later disposing of it, he wavered on whether he had shot Mr. Stout with this gun or another gun. He claimed to know nothing about Mrs. Stout's shooting, and even claimed that he was not in the house when it occurred. Stumpf Hr'g Tr. at 187–98 (Factual Basis Hr'g).

B. State court proceedings.

1. Stumpf was indicted for aggravated murder and various other crimes involving the Stout slaying.

Based on Stumpf's confession, and the police investigation, a Guernsey Country grand jury issued a five-count indictment against Stumpf for his role in the robbery and shooting at the Stouts' home. In particular, the grand jury charged Stumpf with Mrs. Stout's aggravated murder (Count 1), the attempted aggravated murder of her husband (Count 2), grand theft (Count 3), grand theft—motor vehicles (Count 4), and grand theft—firearm (Count 5). J.A. 117–21.

Of particular importance here, the aggravated murder count (Count 1) also contained "capital specifications." Under Ohio law, a defendant is not automatically eligible for the death penalty simply by being convicted of aggravated murder. Ohio Rev. Code § 2929.04(A). Rather, capital

punishment can be imposed only if the indictment alleges aggravating circumstances, or what Ohio courts refer to as "capital specifications" or "death specifications," in connection with the crime. *Id.*; see also Ohio Rev. Code § 2929.03(A). An indictment may contain multiple capital specifications for a given count. While any one specification can be enough to support a death sentence, each separate specification also remains important. That is because, during the sentencing phase of a capital trial, the factfinder is called upon to weigh aggravating circumstances against mitigating circumstances. Ohio Rev. Code § 2929.03(D) & (F). And it is settled law in Ohio that in conducting that weighing, the factfinder may consider, on the "aggravating side," only the capital specifications contained in the indictment and of which the defendant has been found guilty beyond a reasonable doubt. *Id.* § 2929.04(B); see also *State v. Cooey*, 544 N.E.2d 895, 916–17 (Ohio 1989) (only the aggravating circumstances that apply to the particular aggravated murder count being considered may be weighed against the mitigating factors).

Stump's indictment included three separate capital specifications. First, the indictment charged that the aggravated murder was committed for the purpose of "escaping detection, apprehension, trial, or punishment for another offense," or in other words, that Mrs. Stout was killed because she was a witness to the aggravated robbery (referred to here as the "witness-killing specification"). *Id.* § 2929.04(A)(3); J.A. 117. Second, it alleged that the aggravated murder occurred as "part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, to wit: Mary Jane Stout and Norman Stout" (the "multiple-murder specification"). Ohio Rev. Code § 2929.04(A)(5); J.A. 118. Third, the indictment contained a felony-murder specification. *Id.* Under Ohio law, this latter specification required two elements: (1) that the aggravated murder occur in the course of another felony, and (2) that

either (a) the person charged was the "principal offender" in the killing, or (b) that the killing occurred as a result of "prior calculation and design." Ohio Rev. Code § 2929.04(A)(7). Accordingly, Stumpf's felony-murder specification charged that (1) the aggravated murder occurred while Stumpf "was committing, or attempting to commit, or fleeing immediately after committing . . . the offense of [aggravated robbery], and (2) that Stumpf "was the principal offender in the commission of the offense of [aggravated murder]." J.A. 118.

Importantly, only with regard to the third specification, the felony-murder specification, did it matter whether or not Stumpf was the "principal offender" (i.e., the actual shooter). Under the other two specifications, he could be death-eligible whether he actually pulled the trigger or not. See *State v. Smith*, 684 N.E.2d 668, 691 (Ohio 1997).

The aggravated murder count, as well as the attempted aggravated murder count, also contained a firearm specification. J.A. 118, 119. This specification did not make Stumpf eligible for capital punishment. Rather, if proven, it would enhance his sentence by a mandatory three-year term (for each such specification) that he must serve before beginning any other terms of incarceration.

2. Stumpf pleaded guilty in exchange for the prosecutor's agreement to drop two of the three capital specifications on the aggravated murder charge and the three robbery and theft charges.

Stumpf waived his right to trial by jury and instead chose to be tried before a three-judge panel. Stumpf Voir Dire Tr. 905–07 (Aug. 23, 1984) (Dist. Ct. R. 13). The day the trial was set to begin, the prosecutor and Stumpf's counsel announced that they had reached a plea agreement. Stumpf Hr'g Tr. 5–11 (Plea Hr'g), J.A. 130–35. Stumpf agreed to plead guilty to aggravated murder and attempted aggravated murder, and in exchange, the prosecution dropped

the robbery and theft charges (counts three, four and five). The prosecution further agreed to treat the two separate firearm specifications (on the murder and attempted murder) as arising out of the same transaction for sentencing purposes, meaning that Stumpf would get only one three-year firearm enhancement, as opposed to two, *Id.* at 131–35.

Most important, the prosecution agreed to drop two of the three capital specifications on the aggravated murder charge. In particular, the prosecution dropped the multiple-murder specification, and the felony-murder specification (i.e., the only specification that required the State to prove that Stumpf was the "principal offender"). *Id.* at 132.

As a result of this plea deal, Stumpf remained eligible for the death penalty, a fact that, as described below, he expressly acknowledged. At the same time, however, the prosecutor's agreement to drop two of the three capital specifications limited the nature of the aggravating circumstances that the three-judge panel could consider in its sentencing decision, thereby increasing the likelihood that he would escape a death sentence.

3. During the plea colloquy, Stumpf admitted that his attorneys explained the charges to him.

As part of that plea process, the court engaged in a lengthy colloquy with Stumpf and his attorneys regarding the plea. Because the plea and the events surrounding it are central to the claims here, the plea colloquy is reprinted in its entirety in the joint appendix. J.A. at 128–55. A review of that plea hearing confirms several key points about Stumpf's plea.

First, the record shows that the court expressly asked Stumpf's attorney whether he had explained the elements of the charged crimes to his client:

> [THE COURT]: Have you informed your client of the elements of the offenses with which he is charged,

of all defenses which may be available to him and of all of his Constitutional rights, both State and Federal?

[STUMPF'S ATTORNEY]: Yes, we have.

Id. at 135.

Second, Stumpf confirmed that his attorneys had undertaken that explanation:

[THE COURT]: Now, you heard the questions that I put to your attorneys, I believe, relative to their advice to you and their counseling of you, did you not?

[STUMPF]: Yes, sir.

[THE COURT]: *Do you personally acknowledge that your attorneys have informed and advised you as they say they have?*

[STUMPF]: *Yes, sir.*

[THE COURT]: Are you satisfied with the services which they have performed for you?

[STUMPF]: Yes, sir.

Id. at 137–38. (emphasis added).

Third, Stumpf expressly stated that he understood that, notwithstanding the plea, he could still be sentenced to death:

[THE COURT]: For the first count, which is that of Aggravated Murder, you are subject to the following penalties: you are subject to . . . a sentence of life without probation for twenty years; a sentence of life without probation for a period of thirty years *and the death penalty by electrocution could be imposed against you. Do you understand that, sir?*

[STUMPF]: Yes, sir.

Id. at 139 (emphasis added).

The court also informed Stumpf that his sentence would be determined after a mitigation hearing. *Id.* at 140–42. And Stumpf indicated through his attorneys that he would "present evidence . . ..relative to his conduct" at that time. *Id.* at 142.

4. The factual basis hearing corroborated the plea.

Because this was a capital case, Ohio law required a factual basis hearing to corroborate Stumpf's plea. Ohio Rev. Code § 2945.06; Ohio R. Crim. P. 11(C)(3). At that hearing, the prosecution presented ballistics evidence showing that the bullets that wounded Mr. Stout and all of the bullets that hit Mrs. Stout, the murder victim, came from the same gun, and that the bullets came from either a Raven .25 or another gun with "left-hand twist," a characteristic Wesley's Armi .25 did not have. Stumpf Hr'g Tr. 342, 337–47 (Factual Basis Hr'g). The State also presented evidence showing that during the robbery and shooting of Mr. Stout, Stumpf carried, and fired, a Raven .25. *Id.* at 187–98.

In addition, the State presented Mr. Stout's testimony that Stumpf had held him and his wife at gunpoint, and that Stumpf shot him. *Id.* at 316. Mr. Stout also testified that after he had been shot the second time, he heard two male voices talking, followed immediately by four shots. *Id.* at 317–19. Mr. Stout did not see who shot his wife.

When the factual basis hearing ended, Stumpf's attorneys moved for acquittal on the aggravated murder charge and the witness murder specification. The court denied the motion. J.A. 157. Stumpf's lawyers also moved to dismiss the witness murder specification, relying on *Enmund v. Florida*, 458 U.S. 782 (1982). J.A. 160–63. The court also denied that motion. *Id.* at 167. The three-judge panel found

Stumpf guilty of both aggravated murder and the specification, and entered a verdict on that charge and specification as well as on the attempted aggravated murder count. *Id.* at 169–70; Pet. App. 215a.

5. The court sentenced Stumpf to death.

The court then held a mitigation hearing, as required for all capital cases. Ohio Rev. Code § 2929.03(D). At the hearing, Stumpf admitted that he robbed the Stouts' home and that he shot Norman Stout in the head. He claimed, however, that he did not shoot Mrs. Stout. Stumpf Hr'g Tr. 500–03 (Sentencing Hr'g).

After considering all of the evidence presented, the three-judge panel unanimously sentenced Stumpf to death. J.A. 199. The court cited several factors supporting its conclusion that the aggravating circumstance—witness murder—outweighed the mitigating circumstances shown (i.e., Stumpf's relative youth—he was 23—and limited prior criminal record). To be sure, one of the court's considerations was its belief that Stumpf was the actual shooter. That belief led it to reject Stumpf's claim that he was a minor participant in the crime, which is a mitigating factor under Ohio Revised Code § 2929.04(B)(6). Pet. App. 219a. But, in explaining its reasons for finding that the aggravating circumstance outweighed the mitigating factors, the court also pointed to other aspects of the way in which the witness-killing was carried out—how Stumpf and Wesley entered the house and assumed control of the victims in a "methodical manner," as shown by (among other things), Stumpf's continuous holding of the victims at gunpoint, Stumpf's "shooting [Mr. Stout] at close range between the eyes," firing a second shot into Mr. Stout's head, and, Stumpf and Wesley "engaging in dialogue in the proximity of the male victim followed by four shots, the bullets of which were found in the head and body of Mary Jane Stout." Pet. App. 219a–20a. The court also found that Stumpf and his companion failed to help the victims, fled immediately from the scene with the victims' automobile and personal property, including firearms and ammunition, and that Stumpf made no effort to disassociate himself from his companion, and actively participated in selling the guns stolen from the victims' home. *Id.* at 220a–21a.

6. Wesley is convicted at trial.

Seven months after Stumpf's guilty plea and death sentence, Ohio tried Wesley for his role in the Stout slayings. Ohio was unable to try Wesley sooner, as he had fled the State immediately after the crimes, and fought extradition from Texas. *Id.* at 7a.

At Wesley's trial, the prosecution called James Eastman, the person with whom Wesley shared a cell while he was awaiting trial. Eastman testified that Wesley had admitted to Eastman that he (i.e., Wesley) shot Mrs. Stout. It is uncontested that Eastman first heard this supposed admission, and that the State first learned of it, after Stumpf's plea and sentencing. *Id.* at 270a–72a, 275a–76a. Wesley, by contrast, maintained that Stumpf had been the triggerman. Wesley Trial Tr. 2780–88 (Dist. Ct. R. 33).

During the closing statement at Wesley's trial, the State presented two alternative arguments. The State said that either (1) Wesley had been the shooter, or (2) Stumpf had been the shooter and Wesley was criminally complicit. See J.A. 278–85. The jury ultimately convicted Wesley of aggravated murder and the witness-killing specification, but found him not guilty on the felony-murder specification (i.e., the only specification that expressly charged that Wesley was the principal offender). Wesley Trial Tr. 3241–43 (Dist. Ct. R. 41). At sentencing, the jury recommended a life sentence with the possibility of probation after twenty years. *State v. Wesley*, 1986 Ohio App. Lexis 8651, at *1 (Ohio Ct. App. Sept. 22, 1986).

7. Stumpf moved to withdraw his guilty plea.

After Wesley's conviction, Stumpf moved to withdraw his guilty plea. Pet. App. 266a–68a. Under Ohio Rule of Criminal Procedure 32.1, a defendant may move to withdraw his plea after sentencing "to correct a manifest injustice." See *State v. Xie*, 584 N.E.2d 715, 719 (Ohio 1992) (decision to deny pre-sentence motion to withdraw guilty plea is within the sound discretion of the trial court). In his motion, Stumpf made no claim that he had not understood the elements of the offense to which he pleaded guilty. Instead, Stumpf sought to vacate his plea based on the fact that the State had presented evidence at Wesley's trial that it was Wesley, not Stumpf, who shot Mrs. Stout. Pet. App. 266a–68a.

In response, the prosecutor made two arguments why the court should not allow Stumpf to withdraw his plea. He argued that Stumpf was the actual shooter. J.A. 125. But he also argued that such a "finding is unnecessary to imposition of the death penalty." *Id.* Or, in other words, "[e]ven deleting the finding that Stumpf was the principal offender and actually shot Mrs. Stout, the remaining findings of the court amply support the determination that the aggravating circumstances outweigh the mitigating factors." *Id.* at 126.

On October 2, 1985, after reviewing both the jailhouse informant's and Wesley's testimony from Wesley's trial, the trial court denied Stumpf's motion. Pet. App. 277a–80a.

Stumpf filed a supplemental brief in the Fifth District Court of Appeals, raising his claims regarding the motion to withdraw his plea as an additional issue in his pending direct appeal of his conviction. The Fifth District Court of Appeals affirmed both his conviction and the denial of his motion to vacate his guilty plea. *Id.* at 180a–214a. It found that Eastman's statement did not qualify as "newly discovered evidence," and that, in any event "[t]he evidence beyond reasonable doubt shows [that] Stumpf was at least one of [Mrs. Stout's] principal slayers." *Id.* at 204a.

Stumpf then appealed to the Ohio Supreme Court. That court also rejected Stumpf's arguments. *Id.* at 156a–77a. In so doing, the Ohio Supreme Court expressly stated that Stumpf did not "claim that his plea was not entered knowingly, intelligently, and voluntarily." *Id.* at 170a. The Court denied certiorari. *Id.* at 178a–79a.

Stumpf then brought a state post-conviction action further challenging his guilty plea. The state courts again rejected his claims, both in the trial court and on appeal. *Id.* at 227a–41a. The Court again denied certiorari. *Id.* at 236a.

C. Stumpf sought federal habeas relief.

Stumpf then petitioned for a writ of habeas corpus in federal district court. In his Second Claim for Relief, Stumpf asserted that his guilty plea was not knowing, intelligent, and voluntary because he alleged that his attorneys told him that he could not be sentenced to death if he pleaded guilty. The district court rejected this claim on the merits on February 7, 2001. J.A. 32–44. Importantly, Stumpf did not claim that his attorneys had failed to explain the elements of the crimes to him.

In Stumpf's Seventh Claim for Relief, he argued that he should have been granted a new trial because, in his view, the Eastman testimony amounted to later-discovered evidence that Wesley was the actual shooter. Apparently, the district court sua sponte raised the question whether the State's failure to allow Stumpf to withdraw his plea violated his right to due process, insofar as the State prosecuted Stumpf's codefendant based on an "inconsistent theory." The district court ultimately held that Stumpf's due process rights were not violated. J.A. 97–102.

Stumpf then appealed to the Sixth Circuit. There, Stumpf continued to claim that his guilty plea was invalid because (1) he received no benefit from pleading guilty, and (2) his attorney incorrectly told him that he would not be

eligible for the death penalty if he pleaded guilty. *Id.* at 112–16. However, Stumpf conceded in his Sixth Circuit brief that "the record suggests an air of regularity and a valid plea." *Id.* at 109.

The Sixth Circuit, in a 2-1 opinion, granted habeas relief on two independent grounds. First, the Sixth Circuit held that Stumpf's guilty plea was constitutionally involuntary because he did not understand the aggravated murder charge. In particular, the court found that Stumpf's stated desire to put on evidence of his "version of the crime"—that is, his claim that Wesley shot Mrs. Stout—along with "his attorneys' argument that [Stumpf] did not intend, and was not even present for, the killing of Mrs. Stout, should have put the trial court on notice that Stumpf was not aware of the true import of his plea." Pet. App. 28a.

Second, the court concluded that the State had violated Stumpf's right to due process by convicting Wesley on evidence—evidence that came to light after Stumpf's conviction and sentence were entered—that was inconsistent with Stumpf's plea. *Id.* at 48a. In particular, the court pointed to the evidence at Wesley's trial that Wesley was the shooter. This was inconsistent with Stumpf's plea, the Sixth Circuit said, because in Stumpf's case the "prosecution offered virtually no evidence regarding intent other than its contention that Stumpf shot Mrs. Stout." *Id.* at 45a–46a.

The dissenting judge disagreed with both of these conclusions. On the first claim, he disagreed with the panel majority's "extensive exegesis of the 'confusion' at the plea hearing itself." *Id.* at 57a. The dissent concluded that "Stumpf understood his legal strategy, executed it according to plan, and got exactly the opportunities that he bargained for, making the grant of a writ of habeas corpus unwarranted." *Id.* at 58a. With regard to the second (inconsistent theories) claim, the dissent observed that "[h]owever flawed a defendant's guilty plea might be, it

cannot constitute a contradictory prosecutorial theory of guilt as required in [*Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000)]." Pet. App. 54a (Boggs, C.J., dissenting). As the dissent also noted, the record does not show that the prosecutor "was remiss in relying on Stumpf's acknowledgment of guilt." *Id.* at 53a. "At most, the *existence* of [the cellmate's] statement could be argued to have rendered the conviction [of Stumpf] unreliable, but then [the] analysis would simply be that of any newly discovered evidence, which proceeds against a more difficult background." *Id.* at 55a–56a (citing *United States v. O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986); *Herrera v. Collins*, 506 U.S. 390, 400 (1993)). As the dissenting judge noted, "[i]t would indeed be bizarre if [the cellmate's] statement could not undermine Stumpf's conviction by its own force, but introducing it into another proceeding could do so." Pet. App. 55a–56a. The Sixth Circuit denied a petition for rehearing and rehearing en banc. J.A. 8.

This appeal followed.

SUMMARY OF ARGUMENT

The Sixth Circuit granted Stumpf habeas relief on two separate grounds. Its reasoning on each was flawed.

1. Stumpf's plea was knowing and voluntary. The Sixth Circuit's contrary conclusion is wrong for at least two reasons. First, the Sixth Circuit's reasoning assumed that the State's theory of guilt in Stumpf's case—that Stumpf fatally shot Mrs. Stout—was the only basis on which the State could convict Stumpf of aggravated murder. But that is not the case. Under Ohio law, an accomplice who acts with the intent required for an underlying crime can be liable as a principal. Ohio Rev. Code § 2923.03(A) & (F). And contrary to the Sixth Circuit's view, a finding that the defendant "specifically . . . intended to cause the death of another" requires only that the defendant entered into a common

design with others to commit a felony, and either knew that an inherently dangerous instrumentality would be used, or that the manner of the felony was reasonably likely to produce death. Stumpf's participation in the events at the Stouts' home, including that he undisputedly shot Mr. Stout, easily satisfies this standard, even if he was not the one who fatally shot Mrs. Stout. So there was no basis to infer from his insistence that he did not shoot Mrs. Stout that he could not have understood the intent element required for aggravated murder. Thus, Stumpf's insistence that he was not the shooter is consistent with his guilty plea to aggravated murder.

Second, the Sixth Circuit's approach gave insufficient weight to Stumpf's and his counsel's representations on the record that counsel advised Stumpf about the elements of the offense. Under *Henderson v. Morgan*, 426 U.S. 637 (1976) ("*Henderson*"), those representations easily satisfy the State's obligation to point to a basis in the record supporting the voluntariness of the plea. Here, the record indicates the regularity of the plea hearing, so that should suffice to show voluntariness. Stumpf can overcome that only by presenting compelling, extrinsic evidence of involuntariness, or, at a minimum, a record showing that no reasonable defendant who was properly advised by counsel would have pleaded guilty. In this case, the ballistics evidence showed that the gun that killed Mrs. Stout was the same one that wounded Mr. Stout, and Stumpf admitted that he shot Mr. Stout twice. Mr. Stout lived through his shooting, and was available to testify against Stumpf. Faced with the evidence that Stumpf knew was available to the prosecution, Stumpf's decision to plead guilty to reduced charges and specifications, which reduced the possibility that he would receive the death penalty, was a reasonable choice, and does not undercut the voluntariness of his plea.

2. The Sixth Circuit's "inconsistent prosecution" due process theory was equally flawed. According to the court

below, Stumpf's plea violated due process because the State subsequently prosecuted Wesley, Stumpf's co-defendant, based on the "inconsistent theory" that Wesley shot Mrs. Stout. Pet. App. 48a. But that holding is wrong for several reasons.

First, it is wrong as a matter of fact, as the evidence that the State presented in Wesley's trial was entirely consistent with Stumpf's guilt on the aggravated murder charge.

Beyond that, the theory also fails as a matter of law. To the extent that this due process claim is merely a repackaged "involuntary plea" claim, it fails for the reasons discussed above. On the other hand, to the extent Stumpf's due process claim is an attack on his guilty plea that does not rest on "involuntariness," it runs headlong into the "well settled [rule] that a voluntary and intelligent plea of guilty by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Mabry v. Johnson*, 467 U.S. 504, 508 (1984).

Moreover, even if Stumpf could collaterally attack his guilty plea, he has no due process claim here. If the claim is that it was prosecutorial misconduct to make the plea offer, or that the court somehow violated due process in accepting it, the argument fails because, even under Stumpf's account, the plea was perfectly acceptable when made. Stumpf complains only about the later use of newly-discovered evidence at Wesley's trial, evidence not available when Stumpf pleaded guilty. Such later-discovered evidence cannot demonstrate prosecutorial bad faith in plea dealings that occurred before the evidence was found.

Thus, Stumpf's claim must in fact be that the State violated due process when it did not allow him to withdraw his guilty plea in light of the "new evidence." But this argument fails for two reasons. To the extent this is a procedural due process claim (i.e., that the State deprived Stumpf of his right to withdraw a guilty plea without

adequate process), it fails for the simple reason that the State *did* provide sufficient process. Stumpf filed a motion to withdraw his plea in the trial court. Pet. App. 266a–68a. He then litigated that issue in the trial court, Ohio's intermediate appellate court, and the Ohio Supreme Court. And all of these courts considered the withdrawal claim on the merits. They just concluded the Stumpf had not made a valid claim. Thus, he received sufficient process.

If his claim, by contrast, is some form of substantive due process claim (i.e., "the new evidence shows I am actually innocent, and it violates substantive due process to refuse to allow an actually innocent person to withdraw his plea"), it also fails. Having pleaded guilty in state court, Stumpf cannot now use "new evidence" to relitigate his innocence in federal habeas. And even if he could, the new evidence here does not demonstrate that Stumpf was "actually innocent."

In finding a due process violation on these facts, the Sixth Circuit decision conflicts with the well-established precedent from the Court governing claims of prosecutorial misconduct and actual innocence. And in creating this newly minted due process right, the decision below poses a serious threat to the finality of guilty pleas. For as the Court has observed, "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (footnote omitted). Accordingly, the Sixth Circuit's judgment should be reversed.

ARGUMENT

A. Stumpf's guilty plea was voluntary and intelligent.

Stumpf's guilty plea was voluntary and intelligent, consistent with *Henderson v. Morgan*, 426 U.S. 637 (1976), for two reasons. First, contrary to the Sixth Circuit's

reasoning, Stumpf's insistence that he was not the actual shooter is consistent with his guilty plea to aggravated murder. Accordingly, his protest that he was not the one who fatally shot Mary Jane Stout cannot serve as a basis to infer—despite a regular plea hearing record—that Stumpf did not understand the intent-to-kill element of the offense. Second, the plea hearing record confirms that Stumpf's attorneys explained the elements of the offense to him. Under *Henderson*, that is enough to show that the guilty plea was voluntarily and intelligently made. *Id.* at 647.

The Sixth Circuit's contrary ruling reverses the presumption in *Henderson* that a defendant's lawyer has explained the nature of the offense to his client; it effectively requires a trial judge taking a plea to assume that a represented defendant has *not* been adequately counseled. The Sixth Circuit's ruling is contrary not only to *Henderson*, but conflicts with the Court's recognition that "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged . . . he may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [*v. Richardson*, 397 U.S. 759 (1970)]." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) ("*Tollett*"). Stumpf has never made that showing. And the State's strong evidence against Stumpf further confirms that his decision to plead guilty to reduced charges and capital specifications was reasonable, and wholly consistent with his having been properly advised. Accordingly, the ruling below that his plea was involuntary is in error.

1. Stumpf's insistence that he was not the triggerman is consistent with his guilty plea to the aggravated murder of Mrs. Stout.

The Sixth Circuit's ruling is premised on the view that, notwithstanding Stumpf's and his counsel's affirmation on

the record that counsel advised Stumpf of the elements of the crime, Stumpf nevertheless could not have understood the "specific intent" element of the aggravated murder offense because he insisted that he was not the triggerman. See Pet. App. 29a. But the Sixth Circuit's premise rests upon a faulty understanding of what Ohio law requires to show "specific intent" to kill.

Under Ohio law, the State can meet the specific intent element of aggravated murder even where the defendant was merely an accomplice, and did not actually pull the trigger. An indictment on the principal charge also permits conviction as an accomplice. Ohio Rev. Code § 2923.03(F) ("A charge of complicity may be stated in terms of this section, or in terms of the principal offense."). To be sure, Ohio's aggravated murder statute, *id.* § 2903.01,[1] makes specific intent a necessary element of the crime:

> (D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another . . . .

But, under that statute, a jury may, after considering all of the evidence, infer specific intent to kill based solely on the defendant's participation in an underlying felony so long as certain conditions are met. In particular, the State must show that the defendant engaged in a common design with others to commit the offense by force and violence, and either that

[1] The aggravated murder statute was later amended to remove former Ohio Revised Code § 2903.01(D), leaving in place the existing requirement that the aggravated murder be done with the *mens rea* of "purpose," the highest mens rea in Ohio law. *Id.* § 2903.01(B) (1998); see also *id.* § 2901.22(A) ("A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."). The amended aggravated murder statute is not at issue in this case.

the defendant knew that an inherently dangerous instrumentality was to be employed to accomplish the felony, *or* that "the felony and the manner of its accomplishment would be reasonably likely to produce death." *State v. Scott*, 400 N.E.2d 375, 382 (Ohio 1980) (describing evidence sufficient to show intent to kill under prior statute); see also *In re Washington*, 691 N.E.2d 285, 287 (Ohio 1997) (applying *Scott* regarding sufficient proof of intent to kill, to showing required under former Ohio Revised Code § 2903.01(D)). Based on that showing, the jury may, but is not required to, find specific intent.

In a case directly on point, *In re Washington*, the Ohio Supreme Court held that when "the prosecution seeks to prove intent to kill by establishing the defendant's participation in planning and executing a robbery, the factfinder may infer the defendant's intent to kill and may base its finding of intent to kill *solely on that inference*." 691 N.E.2d at 287 (emphasis added). Consistent with the above explanation of Ohio Revised Code § 2903.01(D), the court further reasoned that although "the state has produced sufficient evidence to permit the factfinder to draw the inference [it] does not *mandate* a finding that the defendant possessed a specific intent to kill"; rather, "the factfinder remains bound to consider all evidence of the defendant's intent to kill." *Id.* (emphasis added); see also *Scott*, 400 N.E.2d at 382 (defendant knew that his accomplices carried guns when kidnapping the victim); *State v. Ballew*, 667 N.E.2d 369, 376–77 (Ohio 1996) (defendant carried a handgun and assembled an armed group to kidnap the victim; circumstantial evidence sufficient to support finding of specific intent to kill even if Ballew's partner fired the shots); *State v. Smith*, 684 N.E.2d 668, 691 (Ohio 1997) (defendant's accomplice killed a victim in accordance with the robbery plan). In sum, Ohio Revised Code § 2903.01(D) amounts to this: a factfinder cannot be told that it *must* find that the defendant specifically intended the victim's death

because the defendant participated in the underlying felony, but such a finding certainly is permissible.[2]

The Sixth Circuit holding, by contrast, reflects a belief that the fact of whether or not Stumpf was the actual shooter is crucial in determining his criminal liability for aggravated murder. In support of its reasoning, however, the court inexplicably relied on *In re Washington*, a case, as explained above, that *affirmed* the conviction of a defendant who was not the triggerman and expressly stated that a jury may infer specific intent from participation in the felony. True enough, the *Washington* court recognized that a factfinder must consider all of the evidence in making its specific intent decision, but that only restates the Ohio Revised Code § 2903.01(D) rule that says the specific-intent inference is not conclusive. A requirement that the factfinder consider any other evidence is miles away from the Sixth Circuit's requirement that the prosecutor *must* produce additional evidence supporting a specific intent finding. The Sixth Circuit's reading of *Washington*, consequently, is an implausible one, and refutes rather than supports its conclusion.

Perhaps recognizing this flaw, the Sixth Circuit attempted to buttress its holding through its observation that "the prosecution presented no evidence that Stumpf intended Mrs. Stout's death, other than arguing that he was the actual shooter." Pet. App. 29a. That is not so. Without question, the prosecutor sought to prove that Stumpf actually shot Mary

[2] Nor does it violate the U.S. Constitution to impose capital punishment on defendants who did not actually kill. In *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987), the Court expressly held that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result."

Jane Stout. But in arguing that point, the prosecutor identified numerous other facts—most of which Stumpf cannot refute—that provided the sort of circumstantial proof courts have long relied on to prove a defendant's state of mind. Stumpf admitted that he shot Norman Stout twice in the head during the course of the same robbery in which Mrs. Stout was killed. Indeed, when he was first apprehended, he assumed Mr. Stout was dead, until he learned otherwise. It would be surprising, and perhaps inconceivable, that Stumpf, believing he killed Mr. Stout, would have objected to killing Mrs. Stout, when she was a witness both to the robbery and to Stumpf's killing her husband. Thus, Stumpf surely had an intent to kill Mrs. Stout, regardless of who actually pulled the trigger. Additionally, Stumpf and Wesley left the Stouts for dead, and stole the Stouts' car and items of personal property. While driving away from the Stouts' house, Stumpf admittedly disposed of the .25 Raven by throwing it out of the car window. Later, Stumpf and Wesley wiped the Stouts' car clean of fingerprints and abandoned it.

Stumpf's active participation in the planning and execution of the armed robbery here provides ample support in the record for a finding of specific intent. Only by ignoring these facts could the Sixth Circuit come to the conclusion that "there was no other evidence in the record to satisfy [the specific intent] element." Pet. App. 29a. Therefore, the facts, in addition to the law, indicate that the prosecutor's evidence could support a finding that Stumpf specifically intended Mary Jane Stout's death, whether he was the actual shooter or not.

Accordingly, Stumpf's insistence that he was not the one who fatally shot Mrs. Stout was factually and legally consistent with his guilty plea to her aggravated murder. On the facts that the prosecutor presented at the time of the plea, Stumpf could be found to have specifically intended to cause Mrs. Stout's death, and accordingly convicted for aggravated murder under Ohio law, even if he was not the triggerman

who in fact fired the fatal shots. Thus, there is no basis for the Sixth Circuit panel's inference that Stumpf must not have understood that "specific intent" was a required element of the offense. Pet. App. 31a. The Sixth Circuit's inference cannot stand in the face of defense counsel's, and Stumpf's, representations on the record that defense counsel explained the elements of the offense to Stumpf. Cf. *Henderson*, 426 U.S. at 647.

Further belying the Sixth Circuit's assessment that Stumpf must not have known what he was doing, Pet. App. at 31a, Stumpf received a real benefit from his guilty plea. He removed two of the three aggravating circumstances from the charge against him, thereby reducing his chance of being sentenced to death. See *State v. Cooey*, 544 N.E.2d at 916–17 (only the aggravating circumstances that apply to the particular aggravated murder count being considered, and of which a defendant is found guilty beyond a reasonable doubt, may be weighed against the mitigating factors); see also *State v. Green*, 738 N.E.2d 1208, 1222–23 (Ohio 2000) (sentencing errors included weighing aggravating circumstance not alleged in the indictment). In considering whether a death sentence was appropriate, the trial court could weigh only the first (i.e., remaining) specification, not the two that had been dropped. And by eliminating the other three charges (aggravated robbery, "grand theft—motor vehicles" and "grand theft—firearm"), Stumpf also reduced the potential jail time he would serve. The Sixth Circuit misapprehended the potential benefit Stumpf stood to receive from a guilty plea to reduced charges and specifications.

The State's evidence against Stumpf was considerable when he entered his guilty plea. He admitted to participation in the robbery, to holding the victims at gunpoint, and to shooting Mr. Stout in the head at close range. The ballistics evidence established that the bullets that killed Mrs. Stout were from the same gun that shot Mr. Stout, and were consistent with a .25 Raven. Stumpf admitted to having the

chrome Raven when he entered the house and held the Stouts at gunpoint, and he admitted that he had that gun, and disposed of it, after he and Wesley left the Stouts' house.

The evidence at the time of Stumpf's plea pointed to Stumpf not only as a major participant in the crimes at the Stouts' house, and one who acted at least with "reckless disregard for human life," *Tison v. Arizona*, 481 U.S. at 157, but also as the triggerman whose bullets killed Mrs. Stout. Accordingly, Stumpf's choice to plead guilty to reduced charges was entirely rational, as the dissenting judge below observed, Pet. App. 57a–58a, and does not support an inference that he must not have understood the specific intent element of the aggravated murder charge, see *Tollett*, 411 U.S. at 268 ("[T]he expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well support the advisability of a guilty plea.").

The Sixth Circuit misunderstood Ohio's specific intent requirement for aggravated murder and misapprehended the benefit to Stumpf from pleading guilty to reduced specifications and charges. On that basis, the Sixth Circuit incorrectly inferred that Stumpf was not advised of or did not understand the elements of the charge. The Sixth Circuit's decision not only was flawed in this respect, but, as described below, it fails to give the proper weight to Stumpf's and his counsel's on-the-record representations that Stumpf's counsel explained the offense to him. Accordingly, the Sixth Circuit's judgment vacating Stumpf's plea as involuntary, and thus also vacating his conviction, should be reversed.

2. Stumpf's plea was voluntary and intelligent under *Henderson v. Morgan*, as the record confirms that Stumpf's attorneys explained the elements of the charged offenses to him.

Contrary to the Sixth Circuit's conclusion, the record of Stumpf's 1984 guilty plea hearing shows that his plea was

knowing and voluntary, consistent with *Henderson*. The state trial record confirms that:

- Stumpf was represented by counsel in the plea negotiations and hearing, J.A. 135, 138;
- Stumpf's defense counsel stated on the record that he informed Stumpf of the elements of the charged offenses, *id.* at 135;
- Stumpf acknowledged on the record that his counsel had so advised him, *id.* at 137–38;
- Stumpf acknowledged on the record that the plea agreement was as the prosecutor stated, *id.* at 133;
- Stumpf initialed the amended indictment to which he was pleading guilty, *id.* at 135;
- Stumpf acknowledged on the record that he understood he could still receive the death penalty, *id.* at 139;
- Stumpf acknowledged that no promises had been made, other than the plea agreement recited in court, to induce his plea, *id.* at 142 and
- Stumpf stated on the record that he was in fact guilty of the charge in Count One with the first specification—i.e., aggravated murder of a witness to escape detection and punishment, *id.* at 142, 145.

Moreover, Stumpf never claimed that his guilty plea was rendered involuntary by his attorney's failure to explain the elements of aggravated murder. See Pet. App. 12a ("Stumpf does not contend explicitly that his guilty plea was invalid because he was not aware that specific intent was an element of the crime."). Therefore, contrary to the Sixth

Circuit's reasoning, *Henderson* here leads to the conclusion that Stumpf received "adequate notice of the offense to which he pleaded guilty," 426 U.S. at 647, before his plea.

A guilty plea "is the defendant's consent that judgment of conviction may be entered without a trial," and, thus, "not only must be voluntary," but also knowing and intelligent, "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (pleading guilty implicates the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to trial by jury, and the Sixth Amendment right to confront one's accusers). "[B]ut [the Constitution] permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor," including the failure of counsel to point out a potential defense. *United States v. Ruiz*, 536 U.S. 622, 630–31 (2002) (citing *United States v. Broce*, 488 U.S. 563, 572–73 (1989) (guilty plea not rendered constitutionally invalid because defendants were unaware that by pleading guilty to the indictment, they were forgoing defense that they were improperly sentenced for two crimes instead of one)).

In *Henderson*, *supra*, the Court held that the defendant's guilty plea to a lesser-included offense not charged in the indictment was involuntary under the Fifth Amendment. The Court's decision, by its own terms, was limited to the "unique" facts of the case. *Henderson*, 426 U.S. at 647. The facts there were "unique" because the habeas petitioner presented evidence *from his state court attorneys* that they "did not explain the required element of intent." *Id.* at 642. Contrasting the facts before it from the usual case, the Court pointedly observed, "*[n]ormally, the record contains* either an explanation of the charge by the trial judge, or at least *a representation by defense counsel that the nature of the offense has been explained to the*

accused." *Id.* (emphasis added). The Court added, "even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Id.* at 647; accord *Marshall v. Lonberger*, 459 U.S. 422, 437 (1983) ("Under *Henderson*, [a defendant] must be presumed to have been informed, either by his lawyers or at one of the presentencing proceedings, of the charges on which he was indicted.").

Under the "normal" circumstance contemplated by *Henderson*, then, defense counsel's representation on the record that he explained the elements of the offense to the defendant, especially where the defendant also acknowledges that his attorney so advised him, should be the end of the matter. *Henderson* simply requires that there must be some basis from the record of the trial court proceedings to conclude that the defendant was made aware of the elements of the offense, either by the court, by defense counsel, or through the court proceedings themselves. Thus, to conclude that a plea is voluntary, it is enough that defense counsel or the defendant represents to the court that counsel has advised the defendant of the nature of the charge and the constitutional protections waived by a plea. As a constitutional matter, a trial judge at a plea colloquy need not recite the elements of the offense to the accused, cf. *Henderson*, 426 U.S. at 647 n.18, or quiz defense counsel about the legal advice she has given her client.

Where the trial court's record of the plea hearing is regular on its face, as it was here, *Henderson* implies that the burden falls on the defendant to show by competent, compelling extrinsic evidence that despite that record, he was not advised of the elements of the offense to which he pleaded guilty. See *Tollett*, 411 U.S. at 267 ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged . . .

he may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*."). Absent such extrinsic evidence, a represented defendant claiming insufficient explanation must show, at a minimum, that no reasonable defendant would have pleaded guilty.

Here, the plea colloquy shows that Stumpf's plea was voluntary under *Henderson*. During a detailed, on-the-record inquiry, Stumpf's attorney specifically represented that Stumpf had been informed of the elements of the charged offenses, and Stumpf acknowledged that his attorneys had informed him of the charges. J.A. 125, 137–38. Stumpf responded "yes" when asked if he was in fact guilty of the aggravated murder count and the capital specification. *Id.* at 142, 145. Stumpf and his attorney also participated in amending the indictment during the plea hearing, with Stumpf himself initialing the changes to the indictment at counsel table "with the advice and assistance of counsel." *Id.* at 133, 135. On-the-record representations like Stumpf's and his counsel's are a far cry from the "silent record" that the Court found insufficient to uphold the plea in *Boykin*, 395 U.S. at 242.

In the face of these on-the-record statements, Stumpf cannot make the necessary showings under *Henderson* to overcome the presumption. Stumpf here presented *no* competent extrinsic evidence, let alone compelling extrinsic evidence, that his plea was based on an inadequate explanation of the elements.[3] See J.A. 43–44 (D. Ct. Op.) ("The only evidence that petitioner has introduced to challenge the validity of his pleas . . . is his own affidavit, first submitted to the trial court as an exhibit to his postconviction action."). For example, Stumpf's 1988

[3] That is perhaps not surprising, given that Stumpf never explicitly claimed that his guilty plea was invalid owing to a lack of explanation by his counsel regarding the elements. Pet. App. 12a.

affidavit claims that he "did not understand the nature of the charges to which [he] was pleading." J.A. 302. Even that affidavit does not state that his attorneys did not explain the elements of aggravated murder to him. In any case, a court applying *Henderson* veers "wide of the mark" by relying solely on the defendant's (after-the-fact) testimony and by requiring the State to produce contrary evidence. *Marshall*, 459 U.S. at 434. Other than counsel's affirmation at the plea hearing that they *had* advised Stumpf of the elements of the offense, the only other competent evidence regarding Stumpf's trial attorneys' advice about the charge appears in the transcript of the hearing on Stumpf's motion to withdraw his plea. Stumpf's counsel, Mr. Tingle, told the court that he had spent "a substantial number" of hours discussing the case and the plea with Stumpf before Stumpf pleaded guilty. J.A. 207. Stumpf has not shown by any competent extrinsic evidence—much less compelling evidence—that his plea was involuntary and unintelligent because his lawyers failed to properly advise him of the elements of the offense.

Nor could the Sixth Circuit have legitimately concluded that no reasonable defendant who was properly advised by counsel would have pleaded guilty to the aggravated murder charge and specification. Indeed, Stumpf's behavior was entirely consistent with adequate explanation. As noted above, see 24–26, there was abundant evidence to support a conviction. And the plea deal, by dropping two of the three specifications, provided Stumpf his best chance to avoid the death penalty. Under these circumstances, Stumpf has failed to show that he did not receive "notice of the offense to which he pleaded guilty." *Henderson*, 426 U.S. at 647.

And perhaps most telling on this point, Stumpf never challenged his guilty plea on the grounds that his attorneys did not adequately inform him of the elements of the charged crimes. On direct appeal, the Supreme Court of Ohio found that Stumpf did not challenge the voluntariness of his pleas at all. Pet. App. 170a. And, in State post-conviction review,

Stumpf claimed that his attorneys erroneously induced him to plead guilty by assuring him that he would not receive the death penalty. *Id.* at 231a–32a, 31a–32a. Indeed, the Sixth Circuit acknowledged that Stumpf "does not contend explicitly that his guilty plea was invalid because he was not aware that specific intent was an element of the crime." *Id.* at 12a.[4]

To be sure, the specific theory that the State presented at the factual basis hearing was that Stumpf was the triggerman, Pet. App. 29a, but the specific theory presented is irrelevant. After all, Stumpf pleaded guilty to, and was convicted of, a *crime*, not a *theory*. And, as discussed above, at 24–26, the State's considerable evidence of Stumpf's involvement in the crimes at the Stouts' residence supported a finding of guilt on the aggravated murder charge, even if Stumpf was not the triggerman. Certainly, a rational trier of fact could have found the essential elements of aggravated murder beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (on review for sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). Faced with the evidence that he knew was available to the prosecutor, it was rational for Stumpf to have pleaded guilty to a charge with reduced capital specifications to lessen his chance of

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[4] In his federal court habeas petition, one of the reasons Stumpf claimed that his appellate counsel was ineffective was that he did not raise as error that the trial court failed to explain the charge to Stumpf.when he pleaded guilty. See J.A. 75. But even in his federal habeas petition, Stumpf did not claim that his trial counsel did not inform him of the elements of the offense. The district court concluded that counsel was not ineffective for failing to raise this argument on appeal, as the Ohio rule does not require the trial court to explicitly inform the defendant of each element of the offense, and both defense counsel and Stumpf told the trial court that defense counsel had explained the elements of the offense to Stumpf. J.A. 82–88.

receiving a death sentence. Stumpf's disagreement with the State's version of the facts does not necessarily mean that he did not know what the State alleged and the elements of the charge to which he was pleading guilty.

The interjection by Stumpf's counsel that Stumpf wished to present evidence "relative to his conduct," J.A. 142, similarly does not show a lack of explanation. It merely shows that Stumpf wished to argue to the sentencing panel that he was not the actual shooter (or "principal offender"), in hopes of persuading the judges that his (lesser) degree of participation "in the acts that led to the death of the victim," Ohio Rev. Code § 2929.04(B)(6), was a mitigating factor that should be weighed in his favor against imposition of the death penalty. The sentencing panel did not accept Stumpf's view of his role in the offense, Pet. App. 217a–21a, but that does not undercut the reasonableness of Stumpf's and his counsel's strategy in presenting it.

As the dissenting judge observed below, Stumpf sought to obtain the benefits of pleading guilty—the dismissal of additional aggravating circumstances—while reserving his opportunity to contest the State's version of the facts and argue for leniency in sentencing. Pet. App. 56a–58a (Boggs, C.J., dissenting). The result of the defense trial strategy here, as the dissenting Sixth Circuit judge noted, appeared to be "neither a surprise nor a disappointment, in the beginning, to the defendant or his counsel." *Id.* at 57a. Stumpf did not object to the course of the sentencing hearing, nor did he attempt to withdraw his plea at that point. *Id.*

Admittedly, evidence later discovered may have led Stumpf to the conclusion that he would have had a better chance at trial than he thought (assuming the evidence had actually come into existence in time for him to use it). But, as the Court long ago held, a "defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the

quality of the State's case or the likely penalties attached to alternative courses of action." *Brady*, 397 U.S. at 757; *Broce*, 488 U.S. at 572–73.

The Sixth Circuit's decision effectively reverses the presumption in *Henderson* that counsel has sufficiently explained the nature of the offense to the defendant, and instead requires a trial judge taking a plea to presume *inadequate* counseling. But *Henderson* does not support that result, and the cost of the Sixth Circuit's approach to the administration of justice and the finality of convictions entered on guilty pleas is substantial. In sum, the record demonstrates that Stumpf's plea was knowing and voluntary for the purposes of *Henderson*, and the Sixth Circuit's contrary decision should be reversed.

B. The Sixth Circuit's "inconsistent prosecution" theory fails on both the facts and the law.

The Sixth Circuit's theory based on the prosecution's alleged use of "inconsistent theories" was also flawed, both on the facts and the law. First, as a matter of fact, the prosecution did not present "inconsistent theories." Second, as a matter of law, even if it had, Stumpf would not be constitutionally entitled to relief from his guilty plea where, as here, the evidence overwhelmingly precludes him from demonstrating that he was "actually innocent" of the aggravated murder charge. Accordingly, the Sixth Circuit's judgment should be reversed.

1. The theory at Wesley's trial was not "inconsistent" with Stumpf's plea.

Even if Stumpf's "inconsistent theories" claim worked as a matter of law (and as described below, it does not), it fails on the facts, for the simple reason that the theory advanced at Wesley's trial was not inconsistent with Stumpf's guilty plea. The Sixth Circuit opined that the evidence from Wesley's trial suggesting that it was Wesley,

rather than Stumpf, who shot Mrs. Stout was necessarily inconsistent with Stumpf's plea. But there are two flaws with that view. First, the crimes to which Stumpf pleaded guilty did *not* require the State to prove that he actually shot Mrs. Stout, so even if the State's theory at Wesley's trial was that Wesley was the shooter, it would not be inconsistent with Stumpf's plea. Second, the prosecutor's closing argument at Wesley's trial expressly left open the possibility that Stumpf, not Wesley, was the shooter. Thus, in the two proceedings, the State was contending that both were guilty of aggravated murder, a charge wholly supported by the record.

The prosecutor charged Stumpf with aggravated murder, and the indictment included three aggravating factors: (1) murder to escape detection (the witness-killing specification), (2) killing or attempting to kill two or more people (the multiple-murder specification), and (3) committing a murder during the course of a robbery (the felony-murder specification). Each of these three aggravating factors made this a death penalty case in Ohio. But, as described above, see 9 and 22–26, neither the crime of aggravated murder itself, nor two of the three capital specifications, would have required the State to show that Stumpf was the actual shooter. And the prosecution *dropped* the only specification that would have required that showing—the felony-murder specification—as part of the plea deal. That is, the State dropped the only specification that turned on whether Stumpf was the actual shooter.

Accordingly, Stumpf could have been found guilty at trial on the aggravated murder charge (and the attendant witness-killing specification), even if he participated in Mrs. Stout's murder *solely* as an aider and abettor. Ohio Rev. Code § 2923.03(F) ("A charge of complicity may be stated in terms of this section, or in terms of the principal offense."); *State v. Smith*, 684 N.E.2d 668, 691 (Ohio 1997) (for specifications of killing a witness and multiple-murders, the State did not need to prove that the defendant was the actual

killer of one of the victims where the jury reasonably could find that defendant's brother killed the victim in accordance with their agreed plan, and the defendant kicked her in the head to make sure she was dead). And the record, as noted above, contains overwhelming evidence of Stumpf's active participation in the events that led to Mrs. Stout's death. Thus, Stumpf's plea of guilty to aggravated murder is not inconsistent with evidence subsequently discovered, and presented at Wesley's trial, that Stumpf's partner may have fired the fatal shots. Indeed, in opposing Stumpf's attempt to withdraw his plea, the prosecutor made that precise point, arguing that Stumpf's plea could stand whether he was the actual shooter or not. J.A. 124–26.

Nor is it fair to say that the State's theory at Wesley's trial was only that Wesley was the shooter. To be sure, at Wesley's trial, the prosecutor called James Eastman, Wesley's pre-trial cellmate. And Eastman did testify that Wesley admitted to shooting Mrs. Stout. But, in closing, the prosecutor, recognizing that the jury may not find a jailhouse informant to be credible, expressly argued that Wesley was guilty *either* as the shooter *or* because of his criminal complicity in Stumpf's actions. That argument is not necessarily inconsistent, in any way, with Stumpf's plea.

2. Stumpf cannot use federal habeas to collaterally attack his guilty plea.

Stumpf's attempt to attack his conviction on due process grounds also fails on the law. At root, the claim is a collateral attack on his guilty plea. But as the Court has noted, "[i]t is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Mabry v. Johnson*, 467 U.S. 504, 508 (1984). Rather, "[i]t is only when the consensual character of the plea is called into question that the validity of a guilty plea may be impaired." *Id.* at 508–09. This principle rests on concerns for finality,

concerns that take on "special force with respect to convictions based on guilty pleas." *United States v. Timmreck*, 441 U.S. 780, 784 (1979). Accordingly, a defendant seeking to attack his guilty plea, assuming that the plea was knowing and voluntary, must show either that it was "induced by threats . . . misrepresentation . . . or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes)." *Brady v. United States*, 397 U.S. 742, 755 (1970) (quotation marks omitted).

So, for example, in *Mabry*, the prosecutor made a plea offer, and then withdrew it *after* the defendant accepted. The defendant later accepted a new plea offer, but then claimed in habeas, much like Stumpf here, that the prosecutor had engaged in misconduct in connection with the plea. In particular, he claimed that the prosecutor violated due process by rescinding the earlier offer after acceptance. 467 U.S. at 509–11. The Fifth Circuit granted habeas relief. But the Court overruled that holding, finding that "only when it develops that the defendant was not fairly apprised of [a plea's] consequences can his plea be challenged under the Due Process Clause." *Id.* According to the Court:

> The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty. Here respondent was not deprived of his liberty in any fundamentally unfair way. Respondent was fully aware of the likely consequences when he pleaded guilty; it is not unfair to expect him to live with those consequences now.

Id. at 511 (footnote omitted).

Stumpf, of course, attacks the voluntariness of his plea also. But that attack fails for all of the reasons discussed above in Part A. The point of *Mabry* and these other cases, though, is that if the plea is voluntary, a petitioner cannot use

habeas to mount *other* attacks on the prosecutor's conduct in connection with the plea except in very limited circumstances—circumstances not present here. Stumpf has never even alleged that the State "threatened" him, or made "misrepresentations" or "improper promises." See *Brady*, 397 U.S. at 755. Accordingly, he cannot attack his plea, or the conviction that rests on it, through a federal court habeas petition, as it is "not unfair to expect him to live with" the consequences of his plea deal. Or, as Chief Judge Boggs put it in dissent below, Stumpf "got exactly the opportunities that he bargained for, making the grant of a writ of habeas corpus unwarranted." Pet. App. 58a.

3. The Sixth Circuit's decision conflicts with well-established precedent governing claims of prosecutorial misconduct and actual innocence.

Even if Stumpf could escape the general rule barring collateral due process attacks on guilty pleas, he has no viable due process claim here.

1. To the extent his claim attacks the prosecutor's conduct in offering the plea or acquiescing in Stumpf's acceptance of it, the attack fails, as none of the evidence to which Stumpf points was available at the time that Stumpf made his plea. That is, Stumpf's plea, even under his theory, did not result in a due process violation at the time he made it. And there is no reason to believe that a plea, valid when made, can somehow later evolve into a due process problem. Yet, that is exactly what the Sixth Circuit held here. Without citing any decisions by the Court, the Sixth Circuit stated that "Stumpf clearly has a due process claim even though Eastman's testimony [the allegedly inconsistent evidence implicating Wesley as the "actual killer"] was not available at the time of his trial." Pet. App. 39a. The lower court erred in that conclusion.

The Court has recognized two grounds for relief under the Due Process Clause involving claims related directly to the issue of a defendant's factual guilt or innocence: the withholding of exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), and the knowing presentation of perjured testimony or false evidence, *Giglio v. United States*, 405 U.S. 150 (1972). It has left the door open for a third ground: actual innocence. *Herrera v. Collins*, 506 U.S. 390 (1993). The due process ground for relief discovered by the Sixth Circuit conflicts with the Court's decisions governing these recognized grounds for relief.

Because the allegedly "inconsistent" evidence did not exist at the time of Stumpf's trial, the prosecutor did not violate *Brady*, *supra*. Moreover, the Court has suggested that *Brady* is only a trial right, and thus could well not even apply where a defendant pleads guilty without a trial. *United States v. Ruiz*, 536 U.S. 622, 631 (2002). Nor did the prosecutor knowingly rely on perjured testimony or false evidence. See *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (Due process is violated "if a State has contrived a conviction . . . by the presentation of testimony known to be perjured."); see also *Giglio*, 405 U.S. at 153–54; *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Alcorta v. Texas*, 355 U.S. 28, 31–32 (1957). Thus, Stumpf cannot show that the prosecutor violated due process in offering the plea, or in acquiescing in Stumpf's acceptance of it. The prosecutor fully disclosed all evidence of which he was aware, and dealt with Stumpf and his attorney in good faith. That fact is not changed merely because other evidence later became available.

2. Nor does Stumpf's claim fare any better as a challenge to the State's refusal to allow him to withdraw his guilty plea once the new evidence came to light. As a procedural due process claim, Stumpf's claim here is akin to the claim advanced in *Herrera*. There, the defendant contended that new evidence of actual innocence entitled him to a new trial, much like Stumpf here argues that new

evidence of actual innocence entitles him to withdraw his guilty plea (thereby resulting in a new trial). 506 U.S. at 407–08. As the Court observed, though, courts must defer to legislative judgments regarding review of later-discovered evidence:

> Because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, we have exercis[ed] substantial deference to legislative judgments in this area. Thus, we have found criminal process lacking only where it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Id. at 407–08 (quotation marks and citation omitted; alteration in original). Thus, the Court upheld a Texas procedural rule that barred *any review* of the new evidence whatsoever (owing to the time that had passed since conviction). According to the Court, the ability to present that evidence in a request for clemency was sufficient to meet the defendant's due process rights. 506 U.S. at 411–17.

Stumpf has far greater procedural rights under Ohio law than those the Court has already upheld as constitutionally-compliant in *Herrera*. Far from foreclosing Stumpf from presenting the evidence, Ohio rules allowed him to litigate the issue in three separate courts, each of which had all of the "newly discovered evidence" before it. Immediately after Wesley's verdict, Stumpf filed a motion at the trial court seeking to withdraw his plea based on the "new evidence." He also attached the transcripts of Wesley's and Eastman's testimony from Wesley's trial to that motion, putting all the evidence before the courts. Pet. App. 267a. When his trial court motion failed, Stumpf also litigated the issue as part of his direct appeal in both the intermediate appellate court and the Ohio Supreme Court. And all three of these courts

considered his claim on the merits. That is far more process than was available in *Herrera*. Moreover, as in *Herrera*, Stumpf has the ability to use the evidence to support a clemency request. In short, the abundant avenues for state review of the "new evidence" clearly satisfy the procedural requirements of the Due Process Clause.

Nor does the claim fare any better as a substantive due process claim. It surely could not have violated substantive due process to hold Stumpf to his plea once made. As the dissent below cogently observed, the prosecutor in this case could not have been "remiss in relying on Stumpf's acknowledgment of guilt." Pet. App. 53a. It is well established that prosecutors may rely on a defendant's statement that he is guilty. After all, "a guilty plea is an admission of all the elements of a formal criminal charge." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). Indeed, a counseled plea constitutes "an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Haring v. Prosise*, 462 U.S. 306, 321 (1983) (emphasis added). Nor is Ohio aware of *any* due process decision from the Court requiring a prosecutor to agree to a new trial, or forbidding a conflict-free prosecutor from vigorously representing the State. The only possible exception to this rule is an actual innocence claim, but, as shown below, Stumpf cannot avail himself of that exception. Accordingly, even if habeas allowed collateral attacks on guilty pleas (or on the State's refusal to allow the withdrawal of a guilty plea), Stumpf has not established a viable due process claim here.

4. Stumpf cannot make an "actual innocence" claim, as no such claim exists in habeas, and, in any event, Stumpf is not actually innocent.

At the end of the day, Stumpf's due process claim boils down to some species of "actual innocence" claim. He

believes that the new evidence shows he is not guilty of aggravated murder, and that his conviction thus cannot stand. But that argument fails for two reasons. First, the Court has expressly held that "actual innocence" is not a free-standing constitutional claim. Thus, it cannot, in and of itself, support a grant of habeas. Second, even if it could, Stumpf cannot demonstrate actual innocence here under the stringent standards set forth in *Herrera*, *supra*, and *Schlup v. Delo*, 513 U.S. 298 (1995).

As the Court observed in *Herrera*, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. at 400. Or, stated alternatively, "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Id.* (quotation marks and emphasis omitted). That is, habeas does not extend "to freestanding claims of actual innocence." [5] *Id.* at 404–05.

But that is precisely the type of claim that Stumpf presses here. Stumpf points to Eastman's testimony from Wesley's trial to show that Stumpf himself was not the shooter, and thus is not guilty of the crime. And in making that claim, Stumpf triggers the exact problem the Court discussed in *Herrera*. Granting Stumpf a conditional order of relief would "in effect require the State to retry petitioner [20] years after his [guilty plea], not because of any constitutional violation" in accepting the plea, "but simply because of a belief that in light of petitioner's new-found

[5] To the extent that *Herrera* suggests that a petitioner can advance an "actual innocence" claim to prevent his execution, that is irrelevant here. 506 U.S. at 417. The Sixth Circuit did not vacate Stumpf's death sentence. Rather, the court vacated his aggravated murder conviction. Thus, this case does not present the "actually innocent of the death penalty" issue.

evidence a jury might find him not guilty at" a new trial. *Id.* at 403. The problem, of course, is that "there is no guarantee that the guilt or innocence determination would be any more exact." *Id.* In short, the new evidence, even if it demonstrated his actual innocence, would not entitle him to relief in habeas.

The Court's decision in *Bousley v. United States*, 523 U.S. 614 (1998), shows that this rule barring free-standing "actual innocence" claims applies with full force in guilty plea cases. There, after the defendant pleaded guilty, he sought to challenge in habeas the factual basis of his plea. To be sure, the Court, in the context of discussing his claim, discussed the standards for "actual innocence." But, the Court never suggested that the petitioner could make a free-standing "actual innocence" claim. Rather, the Court merely held that a petitioner could use actual innocence to overcome the procedural default that would otherwise arise as a result of his failure to challenge the "knowing and voluntary" aspect of his plea during direct review. 523 U.S. at 623. Allowing such use of "actual innocence" is entirely consistent with *Herrera*'s recognition that actual innocence "is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." 506 U.S. at 404. But Stumpf does not have any "otherwise barred constitutional claim[s]"; instead, he asserts that the existence of the new evidence, in and of itself, entitles him to withdraw his plea.

Moreover, even if actual innocence were a freestanding claim, Stumpf could not succeed on it here. To show it, even in the procedural default context, the habeas petitioner must show that "'in light of all the evidence,' 'it is more likely than not that no reasonable juror would have convicted him.'" *Bousley*, 523 U.S. at 623 (quoting *Schlup*, 513 U.S. at 327–28). As a quick review of "all the evidence" shows, Stumpf cannot hope to demonstrate that he is "actually

innocent." Stumpf admits he helped rob the Stouts, Stumpf Hr'g Tr. 500–01 (Sentencing Hr'g); Stumpf admits that the weapon that killed Mrs. Stout was in his hands when the robbery began, *id.*; Stumpf admits that during the robbery, immediately before Mrs. Stout was shot, he shot Mr. Stout in the head twice, *id.* at 502; and Stumpf admits that after the robbery, he again had the gun, when he disposed of it by tossing it out the window of the car he and Wesley stole from the Stouts, *id.* at 503. And Wesley, the only eyewitness to the crime, besides Stumpf himself, says that Stumpf shot her. In short, Stumpf cannot hope to show that "no reasonable juror would have convicted him." Thus, even if actual innocence were a freestanding habeas claim, it is not available to Stumpf here.

C. The Sixth Circuit's newly minted due process right poses a serious threat to the finality of guilty pleas.

As the Court has recognized, vacating any conviction in habeas corpus has tremendous social costs. It may be difficult or impossible to retry the defendant. *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986). Such a retrial may be impossible because of the "erosion of memory and dispersion of witnesses that accompany the passage of time." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quotation marks omitted). Even if a defendant can be successfully retried, there will be "the expenditure of additional time and resources for all the parties involved . . . and the frustration of society's interest in the prompt administration of justice." *Id.* (quotation marks omitted). Moreover, any undermining of the finality of criminal convictions will undercut much of the "deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989).

These costs are amplified when the defendant has pleaded guilty. Just this year, the Court explained that guilty pleas are "are indispensable in the operation of the modern criminal justice system." *United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004). Indeed, the Court

explained that, in crafting rules seeking to vacate guilty pleas, courts should "respect the particular importance of the finality of guilty pleas," which, "usually rest, after all, on a defendant's profession of guilt in open court." *Id.* Moreover, the procedural benefits of guilty pleas—speed, economy, and finality—will be lost if rules for vacating guilty pleas are made too lenient. *Blackledge v. Allison*, 431 U.S. 63, 71–72 (1977).

The Sixth Circuit's new rule poses a serious threat to all of these interests. In particular, the State will be reluctant to accept guilty pleas in cases involving multiple defendants, out of a justified fear that a defendant who pleads guilty will later attack the plea based on "inconsistent" evidence presented against a later-tried co-defendant. This could seriously undermine the State's interests, particularly where the State would otherwise seek to plea bargain in exchange for the defendant's cooperation in the prosecution of others involved in the crime. And where a plea is later overturned based on "inconsistent" evidence, the State runs the risk that the co-defendant will attack his or her conviction on the same ground. Of course, given that there is usually no evidence of record in a guilty plea case, the State will have great difficulty showing that a co-defendant's subsequent prosecution was not somehow "inconsistent" with the defendant's plea.

There is no good reason to wander down this thorny path. Stumpf made the strategic choice to admit his guilt based on all of the available evidence. He "understood his legal strategy, executed it according to plan, and got exactly the opportunities that he bargained for." Pet. App. 58a (Boggs, C.J., dissenting). And the record evidence abundantly demonstrates that he is guilty as charged. Neither the law nor the facts support the decision below vacating his plea, and with it, his murder conviction.

CONCLUSION

For all of the above reasons, the Court should reverse the judgment of the Sixth Circuit.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
**Counsel of Record*
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
FRANKLIN E. CRAWFORD
Assistant Solicitors
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioner

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APPENDIX A

Constitutional Provisions

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The Fifth Amendment provides, in relevant part: "[N]or shall [any person] be compelled in any criminal case to be a witness against himself."

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

APPENDIX B

Ohio Revised Code § 2901.22. Culpable mental states. (as amended by Amended Substitute House Bill No. 511, effective Jan. 1, 1974).

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

* * *

APPENDIX C

Ohio Revised Code § 2903.01 (1984). Aggravated Murder. (as amended by Amended Substitute Senate Bill No. 1, effective Oct. 19, 1981).

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed

during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

APPENDIX D

Ohio Revised Code § 2923.03. Complicity. (as amended by Amended Substitute House Bill No. 511, effective Jan. 1, 1974).

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the follow ng:

(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

(4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed. But a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

APPENDIX E

Ohio Revised Code § 2929.03. Imposing sentence for a capital offense. (as amended by Amended Substitute Senate Bill No. 1, effective Oct. 19, 1981).

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) (1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised

the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D) (1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the reques of the defendant, shall require a pre-sentence investigation to he made and, upon the request of the defendant, shall require a mental examination to be made, and sl all require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division,

or be used in evidence against the defendant on the issue of guilt in any re-trial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three

judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it

found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

APPENDIX F

Ohio Revised Code § 2929.04. Criteria for imposing death or imprisonment for a capital offense. (as amended by Amended Substitute Senate Bill No. 1, effective Oct. 19, 1981).

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable causes to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

APPENDIX G

Ohio Revised Code § 2945.06. Jurisdiction of judge when jury trial is waived; three-judge court. (as amended by Amended Substitute Senate Bill No. 1, effective Oct. 19, 1981).

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death. If in the composition of the court it is necessary that a judge from another county be assigned by the chief justice, the judge from another county shall be compensated for his services as provided by section 141.07 of the Revised Code.

APPENDIX H

Ohio Rule of Criminal Procedure 11(C)(3). Pleas, Rights Upon Plea.

* * *

With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

* * *

Supreme Court, U.S.
FILED
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No. 04-637

In The
Supreme Court of the United States

MARGARET BRADSHAW, Warden,
Petitioner,

v.

JOHN DAVID STUMPF,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

ALAN M. FREEDMAN*
**Counsel of Record*
CAROL R. HEISE
LAURENCE E. KOMP
GARY PRICHARD
MICHAEL J. BENZA
Midwest Center for Justice, Ltd.
831 Main Street
Evanston, IL 60202
Phone: (847) 492-1563
Fax: (847) 492-1861
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the presumption of regularity normally accorded counsel's representations during a plea colloquy may be rebutted, in part, by contrary evidence within the same colloquy and evidence outside the record.

2. Whether due process requires the re-evaluation of a defendant's conviction and death sentence when the prosecutor repudiated the theory and evidence used to secure that defendant's conviction and sentence in order to try and convict a second defendant.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....v

INTRODUCTION.....1

STATEMENT OF THE CASE AND THE FACTS 4

SUMMARY OF ARGUMENT.....13

ARGUMENT 17

I. The Sixth Circuit correctly held Stumpf's guilty plea involuntary under *Boykin v. Alabama* and its progeny because the record as a whole does not fairly support a conclusion that Stumpf understood the true nature of the charge to which he pleaded guilty.....17

A. The Sixth Circuit correctly concluded that under Ohio law aggravated murder requires a finding of specific intent.....18

B. The record does not fairly support a conclusion that Stumpf's guilty plea was voluntary, knowing and intelligent under this Court's precedents.....20

1. Stumpf's plea was entered despite an abiding, obvious and uncorrected misunderstanding about the true nature of both the charged offense and the proceeding itself. 21

a. Petitioner's argument that a confirmation in the record will be sufficient to counter any claim of involuntariness that is not based upon extrinsic

evidence finds no support within the holding, reasoning or facts of *Henderson v. Morgan* 22

b. The Sixth Circuit discovered numerous points of unresolved confusion and contradiction in the record of the plea hearing itself, each of which supports the conclusion that Stumpf never understood the true nature of the charge to which he pleaded guilty. 24

2. Numerous facts and circumstances surrounding the plea also point to an invalid plea 27

II. The Sixth Circuit correctly held that Stumpf's due process rights were violated when the State convicted and sentenced him to death based on a factual theory that the State later repudiated in prosecuting Stumpf's accomplice.....29

A. Due process requires that a defendant's conviction and sentence be re-evaluated when the prosecutor has repudiated the theory and evidence used to secure the original conviction and sentence 29

B. The prosecutor's evidence and theory at Wesley's trial were materially inconsistent with the evidence and theory used to convict and secure the death sentence for Stumpf.....39

C. There is a reasonable probability that Stumpf would not have been found guilty of aggravated murder and would not have been sentenced to death in light of the prosecution's inconsistent positions.....41

1. There is a reasonable probability that Stumpf would not have been convicted of aggravated murder.....41

2. There is a reasonable probability that Stumpf would not have been sentenced to death 44

CONCLUSION 50

TABLE OF AUTHORITIES

Cases

Alcorta v. Texas, 355 U.S. 28 (1957) 31, 39

Berger v. United States, 295 U.S. 78 (1935) 32

Berkemer v. McCarty, 468 U.S. 420 (1984) 15

Blackledge v. Perry, 417 U.S. 21 (1974) 42

Boykin v. Alabama, 395 U.S. 238 (1969) ..... passim

Brady v. Maryland, 373 U.S. 83 (1963) 31

Bullington v. Missouri, 451 U.S. 430 (1981) 33

Cabana v. Bullock, 474 U.S. 376 (1976) 48

California v. Ramos, 463 U.S. 992 (1983) 33

Clemons v. Mississippi, 494 U.S. 738 (1990) 47

Darden v. Wainwright, 477 U.S. 168 (1986) 31

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 32

Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) 38

Enmund v. Florida, 458 U.S. 782 (1982) 46

Estes v. Texas, 381 U.S. 532 (1965) 31

Fahy v. Connecticut, 375 U.S. 85 (1963) 37

Giglio v. United States, 405 U.S. 150 (1972).....31

Giles v. Maryland, 386 U.S. 66 (1967).....33

Green v. Georgia, 442 U.S. 95 (1979).....passim

Henderson v. Morgan, 426 U.S. 637 (1976).....passim

Herrera v. Collins, 506 U.S. 390 (1993).....35, 36

Hill v. Lockhart, 474 U.S. 52, 59 (1985).....42

In re Sakarias, No. S082299, 2005 Cal. LEXIS 2309 (Cal. March 3, 2005).....38

In re Washington, 691 N.E.2d 285 (Ohio 1998).....13, 18, 42

Jacobs v. Scott, 513 U.S. 1067 (1995).....39

Johnson v. Mississippi, 486 U.S. 578 (1988).....16, 33

Kyles v. Whitley, 514 U.S. 419 (1995).....35, 37

Lockett v. Ohio, 438 U.S. 586 (1984).....41

Mabry v. Johnson, 467 U.S. 504 (1984).....47

Marshall v. Lonberger, 459 U.S. 422 (1983).....14, 17, 22

Miller v. Pate, 386 U.S. 1 (1967).....16, 30

Miller-El v. Cockrell, 537 U.S. 322 (2003).....48

Mooney v. Holohan, 294 U.S. 103 (1935).....31, 33 35, 37

Napue v. Illinois, 360 U.S. 264 (1959).....31, 33, 37

Nguyen v. Lindsey, 232 F.3d 1236 (9th Cir. 2000).....38

Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995).....38

Parker v. Dugger, 498 U.S. 308 (1991).....49

Shaw v. Terhune, 380 F.3d 473 (9th Cir. 2003).....38

Skipper v. South Carolina, 476 U.S. 1 (1986).....47

Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000).....38

State v. Gates, 826 So. 2d 1064 (Fla. Dist. Ct. App. 2002)..38

State v. Green, 738 N.E.2d 1208 (Ohio 2000).....46

Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) .35, 38

Tollett v. Henderson, 411 U.S. 258 (1973).....41

Turner v. Murray, 476 U.S. 28 (1986).....33

United States v. Agurs, 427 U.S. 97 (1976).....31

United States v. Bagley, 473 U.S. 667 (1985).....32, 35, 37

United States v. Bakshinian, 65 F. Supp. 2d 1104 (C.D. Calif. 1999).....38

United States v. Butner, No. 98-00174-01-CR-W-1, 2000 U.S. Dist. LEXIS 18005 (W.D. Mo. Nov. 14, 2000).....38

United States v. Dickerson, 248 F.3d 1036 (11th Cir. 2001)38

United States v. Kattar, 840 F.2d 118 (1st Cir. 1988).....38

United States v. Salerno, 937 F.2d 797 (2d Cir. 1991) 38

United States v. Young, 470 U.S. 1 (1985).....37

Wiggins v. Smith, 539 U.S. 510 (2003) 49

Williams v. Taylor, 529 U.S. 362 (2000).....47

Articles

Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423 (2001).....38

Barry Tarlow, *RICO Report: More Prosecutorial Double-Speak*, 27 CHAMPION 52 (2004) 38

Bennett L. Gershman, *The Prosecutor's Duty to the Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001).....37

Michael Q. English, *Note: A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 FORDHAM L. REV. 525 (1999) 38

Steven F. Shatz & Lazuli M. Whitt, *The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants*, 36 U.S.F. L. REV. 853 (2002).....38

State Statutes

OHIO REV. CODE § 2903.01 (1984).....13, 18, 42, 44

OHIO REV. CODE § 2929.04 (1984).....44

Federal Statutes

28 U.S.C. § 2254(d)(8).....49

Rules

U.S. S. Ct. R. 14.1(a).....14

Other Authorities

Death Row U.S.A., Sept. 1, 1999.....46

Model Code of Professional Responsibility EC 7-13 33

INTRODUCTION

John Stumpf is the only party to this case who has been consistent throughout every stage of this case. Stumpf has always maintained that he did not fire the shots that killed Mary Jane Stout. The state, however, secured Stumpf's conviction and death sentence for aggravated murder by grounding Stumpf's guilty plea on the theory that he killed Mrs. Stout. The same prosecutor then prosecuted Stumpf's accomplice, Clyde Daniel Wesley, for aggravated murder, and embraced the position that Wesley had shot and killed Mrs. Stout. Indeed, the prosecutor structured his entire case to bolster and prove the version of the crime delivered by Wesley's cellmate, James Eastman. Eastman's testimony mirrors Stumpf's long-held position. The Wesley jury, however, confronted with Stumpf's plea and death sentence for the same crime, refused to follow the prosecutor's lead and convict and sentence to death a second man for the same crime. Stumpf attempted to withdraw his guilty plea and vacate his death sentence, but the reviewing panel refused to do so. Until the Sixth Circuit granted relief, Stumpf sat on death row despite the fact that the weight of the evidence indicated that he was not even in the room when Mrs. Stout was killed.

The Sixth Circuit granted full relief on two separate grounds. The court determined that the record could not fairly support a conclusion that Stumpf's guilty plea reflected a voluntary, knowing and intelligent waiver of his constitutional rights. In accord with this finding, the court set aside Stumpf's guilty plea and death sentence. The court also determined that the state violated Stumpf's due process rights when it failed to review and correct his conviction and sentence after employing inconsistent and irreconcilable theories to convict Stumpf and Wesley. The court determined that the nature of the due process violation required it to set aside both the guilty plea and death sentence on this ground as well. The facts, the law, and the demands

of justice fully support every aspect of the court's reasoning and holdings.

The court held Stumpf's guilty plea invalid only after an exhaustive review of the record. Following this Court's precedents, the Sixth Circuit first determined whether the evidence Stumpf offered in support of his challenge to the guilty plea raised legitimate doubts about the validity of his guilty plea. After the court determined that Stumpf had raised and supported serious doubts about the validity of the plea, the court proceeded to consider the state's evidence of a valid plea. The state offered the record of the plea colloquy. The court explicitly noted that a reviewing court owes such a record a presumption of regularity. In this case, however, the court determined that the record of the plea colloquy could not sustain the presumption, because it offered more evidence of an invalid plea than it offered of a valid plea. The Sixth Circuit concluded that a confused and contradictory plea colloquy record, which is also contradicted by ample extrinsic evidence of an invalid plea, erodes the trust a reviewing court would normally place in the representations made on that record. In addition, because the state failed to offer any other evidence of a valid plea, the court was left with nothing but uncontradicted evidence of a constitutionally invalid plea.

At its simplest, the issue before this Court is whether it was proper for the Sixth Circuit to review the record of the plea colloquy for regularity. Petitioner characterizes the presumption of regularity such a record usually enjoys as effectively irrebuttable. According to Petitioner, the court must read the record only for whatever confirmations are found therein and disregard any internal contradictions that may contravene those confirmations, because the court may only rely upon direct extrinsic evidence of an invalid plea. Under this theory, a reviewing court must ignore the record as well as the surrounding facts and circumstances. Neither the precedents of this Court, nor the demands of simple justice, support Petitioner's attempt to prevent reviewing

courts from *reviewing* the record. The Sixth Circuit conducted a proper review of the entire record and held that the record did not fairly support a finding that Stumpf's plea was voluntary, knowing and intelligent. Therefore, the court vacated the plea.

The Sixth Circuit also held that the prosecutor's use of inconsistent theories in an attempt to obtain convictions and death sentences against both Stumpf and Wesley, and his subsequent failure to correct that inconsistency by offering Stumpf either a new plea or at the very least a new sentencing hearing, violated Stumpf's due process rights. The court specifically found that the state had taken the firm position at Wesley's trial that Wesley had shot Mrs. Stout. In support of this position, the prosecutor offered a great deal of evidence, including Eastman's testimony, that confirmed Wesley's role as the principal offender. The court determined that the use and subsequent failure to correct these inconsistent prosecutorial theories violated the principle of fundamental fairness the Due Process Clause protects. The court then found that the state's contention that the positions were not inconsistent because neither conviction turned on the identity of the shooter contradicted the clear requirements of Ohio's aggravated murder statute. Stumpf's conviction and death sentence, according to the judicial panel that reviewed and entered his plea, hinged on his status as the principal offender. Once the state undermined that conclusion, Stumpf's plea no longer satisfied the intent requirement; therefore, the conviction and death sentence lost all credibility. The court dismissed the state's habitual counter-argument that Eastman's testimony did not affect Stumpf because Eastman lacked credibility—a position adopted below by the Supreme Court of Ohio and the district court—because no court since the Wesley trial had actually seen the testimony; therefore, these courts could not base an entire decision on a finding that Eastman lacked credibility. The Sixth Circuit's decision is further supported by the fact that both the Ohio Supreme Court and Wesley's jury—in

rejecting Eastman's testimony—mistakenly believed that Stumpf had admitted to being the actual shooter when he pleaded guilty to aggravated murder.

The Sixth Circuit's decision to vacate Stumpf's plea and sentence on this claim ultimately relies on a single determination: the state took materially inconsistent positions. The court's reasoning and holding follow from that one fact. When the state embraced the position that Wesley was the shooter it directly contradicted the position it had advocated before Stumpf's plea and sentencing panel. Indeed, at that point, the state came around to Stumpf's own position. The prosecutor then left this contradiction uncorrected; indeed, he fought to preserve it in the face of Stumpf's motion to withdraw. At root, that festering contradiction was the due process violation. The uncorrected contradiction violated Stumpf's due process rights because it rendered both his conviction and death sentence unreliable. Thus, once the Sixth Circuit determined that the prosecutor had embraced materially inconsistent positions, positions that he then failed to correct, no choice remained but to vacate both the plea and the sentence.

STATEMENT OF THE CASE AND THE FACTS

A. Facts concerning the crime

On May 14, 1984, Stumpf, Clyde Daniel Wesley and Norman Leroy Edmunds met in Stumpf's home and drove along Interstate 70 through Guernsey County, Ohio. Edmonds pulled over because the car was low on fuel and no one possessed money for gas. In response, Wesley, armed with multiple weapons, urged that he and Stumpf enter a nearby home and hold-up the residents. Stumpf accompanied Wesley to the home of Norman and Mary Jane Stout. Edmonds remained in the car. When they reached the front door, Wesley knocked and asked Mr. Stout if he might use the phone. Once he gained entry, Wesley pulled out two

hand-guns and corralled the Stouts into a bedroom. (Sixth Circuit Opinion, Pet. App. at 4-5a).[1]

Wesley left Stumpf to watch the Stouts. The Stouts sat down on the bed and Stumpf kept the gun that Wesley had given him on the couple. As the minutes stretched and mounted, Stumpf grew agitated. At some point, Mr. Stout stood up from the bed and moved on Stumpf. Mr. Stout was shot in the head, but he continued toward Stumpf. Mr. Stout and Stumpf struggled together, and in the struggle Mr. Stout received another shot to the head. Mr. Stout fell to the floor. A short time later, Mrs. Stout was shot and killed. Mr. Stout survived. (*Id.*).

Stumpf has consistently maintained, and the state's evidence at Wesley's trial supports, that after shooting Mr. Stout, Stumpf dropped his gun and ran out of the house through the garage. Mrs. Stout was still alive when Stumpf ran from the house. Wesley soon followed and called Stumpf back into the garage. Edmunds had already fled with the car and Wesley ordered Stumpf to drive the Stout's car. All three men returned to Pennsylvania and were later arrested. Stumpf eventually admitted to shooting Mr. Stout, but he denied any knowledge of Mrs. Stout's shooting. He told police then, and he has maintained ever since, that he was not in the house when Mrs. Stout was shot and killed. (Joint Appendix at 176-79).

B. Guilty plea colloquy

On September 17, 1984, the Guernsey County prosecutor informed the court that a plea agreement had been reached. The trial court conducted a plea colloquy during which Judge Henderson attempted to determine whether

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[1] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari. "J. App." refers to the Joint Appendix to this Court. "Cir. Ct. App." refers to the Joint Appendix to the Sixth Circuit. "Wesley Trans." refers to the transcript of the Wesley trial.

Stumpf was in a position to offer a voluntary, knowing and intelligent plea. During the colloquy, defense counsel Tingle represented that he had explained to Stumpf the elements of the charges, the available defenses, and Stumpf's rights under the Ohio and United States Constitutions. (J. App. at 135). At no point were the specific elements of the charges gone over with Stumpf.

When Judge Henderson asked Stumpf if he understood the rights he was surrendering, Stumpf bucked and a confused exchange between the judge and Stumpf's attorney followed.

> ATTORNEY STEPHENS: Your Honor, with reference to that, we have explained that to the defendant. He was going to respond but we have informed him that there is, after the plea, a hearing or trial relative to the underlying facts so that he is of the belief that there will be presentation of evidence and I wanted to make that clear to the Court with reference to his right of waiver of trial to Court.
>
> JUDGE HENDERSON: I understand that and I appreciate you bringing that to my attention, Mr. Stephens. Of course in the sentencing portion of this trial you do have those rights to speak in your own behalf to present evidence and testimony on your own behalf. My statement to you and my question to you was intended to except those rights that you do have. Counsel, is that satisfactory?
>
> ATTORNEY STEPHENS: Yes, sir.

(*Id.* at 140).

Satisfied with Stephens' answer, and without directing any inquiries to Stumpf, Judge Henderson continued with the colloquy.

> JUDGE HENDERSON: Are you in fact guilty of count one with specification one and specification four?
>
> ATTORNEY STEPHENS: One moment, Your Honor. Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of his right to present evidence at a later time relative to his conduct, but he'll respond to that.
>
> JUDGE HENDERSON: At no time am I implying that the defendant will not have the right to present evidence in mitigation hearing and I do appreciate it, Mr. Stephens, that you bring this to the attention of the Court. And I'm going to ask that the defendant, himself, respond to the question that I asked with that understanding that he has the right to present evidence in mitigation. I'm going to ask the defendant if he is in fact guilty of the charge set forth in Count one, including specification one and specification four?
>
> STUMPF: Yes, sir.

(*Id.* at 142). Stumpf subsequently swore in a post-conviction affidavit that he did not understand this specific exchange. (*Id.* at 302). The court ultimately accepted and finalized Stumpf's guilty plea. (Cir. Ct. App., Vol. I, at 213-16).

C. Evidentiary and sentencing hearings

On September 18, 1984, the trial court conducted an evidentiary hearing in which the prosecutor was required to present the factual basis for the guilty plea that the court had entered the previous day. In his opening, the prosecutor took the position that Stumpf shot Mrs. Stout:

> Believing that he had killed Mr. Stout, this defendant then turned the same chrome colored Raven automatic pistol upon Mary Jane Stout as she sat on the bed and shot her four times.

(J. App. at 152).

In his opening statement, defense counsel accepted the bulk of the prosecutor's characterization of the crime. However, defense counsel indicated an intention to challenge the assertion that Stumpf shot Mrs. Stout at some later point in the proceedings. (*Id.* at 155).

The state presented numerous witnesses in support of its theory that Stumpf was the principal offender. At the close of the state's presentation, defense counsel informed the court, "[i]f the Court please, on behalf of the defendant at this time we do not intend to offer any evidence at this time." (Cir. Ct. App., Vol IV, at 1997). Rather, defense counsel moved for acquittal on all charges. (J. App. at 157). The prosecutor responded, "[t]here's ample evidence to conclude that this defendant fired all the shots that hit anybody." (*Id.* at 158). Defense counsel was asked, once again, if it had anything more to offer. Counsel responded, "[n]ot on this question, your Honor." The court denied the motion to acquit. (*Id.* at 159).

Defense counsel subsequently renewed its motion for a "judgment of acquittal notwithstanding the entry of the pleas" and added a second motion to "eliminate from the potential penalties available in this case the death penalty." (*Id.* at 160). Only at this time did defense counsel offer its

argument that Stumpf did not kill Mrs. Stout. (*Id.* at 160-63). The court denied the second motion. (*Id.* at 167).

During the sentencing hearing, Stumpf's counsel attempted to prove that Stumpf did not have a significant criminal history and that he had a difficult childhood, a limited education and a dependable work history. (Cir. Ct. App., Vol. IV, at 2034-2133). Stumpf also gave an unsworn statement in which he stated that he shot Mr. Stumpf, and then left the house. (*Id.* at 2137). Wesley followed him out of the house shortly thereafter. (*Id.*).

After the sentencing hearing, the court imposed the death penalty. In support of its decision, the court offered, "[t]he Court finds beyond a reasonable doubt that the Defendant was the principal offender in count one of the indictment." (*Id.* at 196).

D. Clyde Daniel Wesley's trial

A short time after Stumpf had been convicted and sentenced to death the same Guernsey County prosecutor prosecuted and convicted Clyde Daniel Wesley for the murder of Mrs. Stout. In his opening statement, the same prosecutor now adopted Stumpf's version of the crime as his own:

> Believing that he has killed Mr. Stout, John David Stumpf pitched the gun aside and left the immediate area back the hallway down the steps to the basement. At that point this defendant [Wesley] whose own gun was jammed, picked that chrome colored Raven up and as Mrs. Stout sat helplessly on her bed, shot her four times in order to leave no witnesses to the crime they thought they had committed in the other killing they thought they had committed.

(J. App. at 226). To prove that Wesley had been the principal offender, the prosecutor offered forensic evidence, the

testimony of various witnesses, including Mr. Stout, and most significantly, the testimony of Wesley's cellmate, James Eastman.

The core of Eastman's substantive testimony offers a version of events that tracks Stumpf's own version:

> EASTMAN: And Stumpf—well, the man, Mr. Stout, I guess, he lunged at Mr. Stumpf and Wesley told him to shoot him. He shot him. I guess he fell down and then I guess Mr. Stumpf panicked, dropped the gun and Wesley picked up the gun and shot the lady. After he shot the lady I guess they was getting the rest of the stuff they was taking out of the house, they was going downstairs getting ready to leave. As they was turning to leave I guess they heard her moan or say something and then he said he turned around and shot her again.

(*Id.* at 241). The prosecutor bolstered Eastman's credibility on direct, and repaired it on redirect, by eliciting the fact that Eastman had not come forward in order to procure a deal for himself. (*Id.* at 244, 264).

The force of Eastman's testimony, however, was severely undermined when Wesley entered Stumpf's guilty plea and death sentence into evidence. (Wesley Trial Trans. at 2681-82).

In his closing argument, Wesley's defense attorney reminded the jury of Stumpf's plea and sentence, mistakenly implying that Stumpf's plea necessarily indicated that he shot Mary Jane Stout. (*Id.* at 3152-53).

Defense counsel referred to these exhibits and the fact that Stumpf had already claimed responsibility for the murder of Mrs. Stout, numerous times during his closing argument. (*Id.* at 3152, 3155, 3157, 3158, 3163). In fact, defense counsel made Stumpf's guilty plea and death sentence the last substantive point he made to the jury. (*Id.* at 3165).

This pattern extended into the sentencing phase. Defense counsel continued to refer to Stumpf's guilty plea and the fact that someone had already been found to be the principal offender. (*Id.* at 3326, 3331, 3335, 3339). The jury found Wesley guilty of aggravated murder but refused the principal offender specification. (*Id.* at 3366). After failing to secure a guilty verdict on the principal offender specification, the prosecutor emphasized at sentencing that Wesley was still death eligible under specification one for being an aider and abettor. (*Id.* at 3040-41). The jury refused the prosecutor's argument and chose the least severe sentence available for the aggravated murder charge. (*Id.* at 3377).

E. Motion to withdraw guilty plea or vacate the death sentence

Stumpf filed a motion for leave to withdraw his guilty plea, or in the alternative, vacate his death sentence on June 7, 1985. (J. App. at 204). Stumpf argued that the prosecutor's position at Wesley's trial, and particularly, the fact that the prosecutor had offered and adopted as true Eastman's testimony, demanded, at a minimum, a new sentencing hearing. (*Id.*).

The prosecutor argued in response that, "[Stumpf] admitted that he did, in fact, purposely kill Mary Jane Stout. . . ." (*Id.* at 209). The prosecutor further argued that the court "made a finding that the defendant, Stumpf, was the principal offender. . . ." (*Id.*). The prosecutor then argued in the alternative that Stumpf could have received the death penalty as an aider and abettor. (*Id.* at 209-210).

Eastman's testimony was entered into the record, but no further hearing or investigation took place. The motion was denied without comment. (Cir. Ct. App., Vol. I, at 379).

F. State Court rulings

On direct appeal the Supreme Court of Ohio held, in relevant part, "[b]y entering his guilty plea to the principle charge and to the specification under R.C. 2929.04(A)(3), appellant admitted that *he* murdered Mary Jane Stout. . . ." (Pet. App. at 170a (emphasis in original)). The court stated that, "Eastman's testimony is hearsay and, in the face of the evidence adduced at appellant's sentencing hearing, of minimal weight." (*Id.* at 171a).

The court conducted an independent weighing of the sentencing factors and found that "the testimony of a cellmate during Clyde Daniel Wesley's trial is of minimal credibility, especially in light of appellant's guilty plea and the substantial evidence to the contrary adduced during appellant's sentencing hearing." (*Id.* at 173a). The court affirmed Stumpf's death sentence.

The Court of Appeals of Ohio, Fifth Appellate District, denied Stumpf's petition for post-conviction relief on July 23, 1990. (Pet. App. at 227a). The Supreme Court of Ohio denied Stumpf's appeal without comment. (*Id.* at 235a).

G. Federal Habeas Corpus rulings

Stumpf petitioned the United States District Court for the Southern District of Ohio for a *Writ of Habeas Corpus*. In his second claim for relief, Stumpf argued that his guilty plea had not been voluntary, knowing and intelligent. (J. App. at 32). Stumpf alleged in his seventh claim for relief that the trial court had improperly denied the motion to withdraw his plea. (*Id.* at 97). The district court denied both claims. The court explicitly noted that it was "troubled" by the prosecutor's conduct, but ultimately adopted the Ohio Supreme Court's after-the-fact determination that Eastman's testimony lacked credibility. (*Id.* at 101). The district court denied the petition on February 6, 2001.

The United States Court of Appeals for the Sixth Circuit granted relief and vacated Stumpf's plea and sentence on two grounds. (Pet. App. at 1-58a).[2]

SUMMARY OF ARGUMENT

The Sixth Circuit vacated Stumpf's plea and sentence on two grounds: the plea did not constitute a voluntary, knowing and intelligent waiver of his constitutional rights; and the prosecutor's failure to correct his use of materially inconsistent theories rendered Stumpf's plea and sentence unreliable, and therefore, violated due process.

The Sixth Circuit properly concluded that Stumpf's plea did not amount to a voluntary, knowing and intelligent waiver. At the time of Stumpf's conviction, an individual could not be convicted of aggravated murder in Ohio unless the state proved specific intent to cause the death of the victim beyond a reasonable doubt. OHIO REV. CODE § 2903.01(1984). Under Ohio law, a fact-finder could not infer specific intent solely from complicity; the fact-finder was required to consider all the available evidence both for and against intent. *Id.*, *In re Washington*, 691 N.E.2d 285, 287 (Ohio 1998). The only proof of intent offered at Stumpf's plea hearing, and the only evidence of intent explicitly cited by the three-judge panel that reviewed and entered Stumpf's plea, was the conclusion that Sumpf had been the principal offender. After a full review, the Sixth Circuit concluded that the record could not fairly support a conclusion that Stumpf had received "real notice of the true nature of the charge against him," *Henderson v. Morgan*, 426 U.S. 637, 645 (1976), because the record completely undermined any conclusion that Stumpf understood he was pleading to being the principal offender.

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[2] The Sixth Circuit declined to address Stumpf's remaining claims for relief in light of its decision granting relief on these two grounds. (Pet. App. at 48a).

The precedents of this Court justify the Sixth Circuit's review of the full record. In the course of its review, the Sixth Circuit determined that the record of the plea hearing itself cast serious doubt on the validity of Stumpf's plea. Petitioner argues that *Henderson* precludes a reviewing court from reviewing a plea hearing for anything other than counsel's confirmations that he has informed his client of the charges and the consequences of his plea. Petitioner constructs this rule from the presumption of regularity this Court has attached to the record of such hearings. *Henderson*, 426 U.S. at 647; *Marshall v. Lonberger*, 459 U.S. 422, 437 (1983). According to Petitioner, only direct extrinsic evidence of a failure to explain the charge, such as an attorney admission, may rebut this presumption. Petitioner's theory of an effectively irrebuttable presumption, however, finds no support in the law. Nothing in *Henderson* or any other case supports the proposition that a reviewing court must ignore the deficient elements of a record when reviewing a plea under *Boykin v. Alabama*, 395 U.S. 238 (1969).

The Sixth Circuit reviewed the record in its entirety, and the court explicitly noted that under most circumstances the plea colloquy would enjoy a presumption of regularity. The court discovered, however, that the plea colloquy was *irregular* on its face. The colloquy exhibited confusion and uncorrected contradictions at the most significant moments. The court properly concluded that such a record could not sustain the presumption, that is, the state would have to offer something more to establish a proper plea. The Sixth Circuit further supported this conclusion with a great deal of extrinsic evidence that confirmed that the problems during the plea hearing were not mere misunderstandings. Thus, the record as a whole pointed to the single conclusion that Stumpf did not receive real notice of the true nature of the charges against him. Indeed, the Sixth Circuit concluded that the evidence far exceeded this threshold and tended to prove that the facts simply could not support the charge. Absent

any evidence to the contrary, the court had no choice but to vacate Stumpf's plea.

The Sixth Circuit also properly vacated Stumpf's plea and sentence because the prosecutor violated Stumpf's due process rights when he failed to correct his use of materially inconsistent theories to convict Stumpf and Wesley. It must be noted that Petitioner's petition for a writ of *certiorari* and brief to this Court do not address the Sixth Circuit's grant of *habeas* relief on the due process claim as to Stumpf's death sentence; Petitioner thus does not present an argument for reversing that portion of the decision.[3] Instead, Petitioner argues only that the prosecutor's inconsistent positions do not entitle Stumpf to relief from his guilty plea. (*See* Pet. Br. at i, 2, 3-4, 19-20, 35-42, 43 n.5, 46). This brief, however, will address both forms of relief.

The record clearly establishes that the prosecutor embraced materially inconsistent positions in an attempt to secure convictions and death sentences for Stumpf and Wesley. The record establishes that Stumpf was convicted as the principal offender; indeed, this theory of the crime constituted the bulk of the evidence for specific intent. The prosecutor then turned around and took the position that Wesley was the sole principal offender. At Wesley's trial the prosecutor characterized all the evidence to support his belief that Wesley alone had shot Mrs. Stout. Most significantly,

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[3] In Petitioner's Brief to this Court, she mistakenly asserts that the Sixth Circuit did not vacate Stumpf's death sentence. (Pet. Br. at 43 n.5). As discussed above, it is clear that the Sixth Circuit vacated both Stumpf's guilty plea and death sentence. Petitioner's confinement of this case to the reversal of Stumpf's guilty plea necessarily means that arguments regarding Stumpf's death sentence are not before this Court. *See* U.S. S. Ct. R. 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). As this Court has repeatedly held, issues not presented in the petition or the petitioner's brief should not be considered "absent unusual circumstances." *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984).

the prosecutor offered the testimony of James Eastman, who reported that Wesley had admitted to killing Mrs. Stout after Stumpf had fled the room. The prosecutor worked to bolster Eastman's credibility during direct examination and vouched for Eastman before the jury. The jury, however, refused to accept the prosecutor's theory of the case—no doubt because they had learned that Stumpf had already been convicted and sentenced to death for the same crime, which led them to the erroneous conclusion that Stumpf had also admitted to being the shooter. The prosecutor's materially inconsistent position at Wesley's trial necessarily rendered Stumpf's plea and sentence unreliable. The failure to correct this inconsistency violated Stumpf's due process rights.

When a prosecutor embraces a theory at an accomplice's trial that directly contradicts the basis for the conviction and sentence of the first defendant, the conviction and sentence of the first defendant are rendered unreliable. More particularly, a prosecutor violates due process when he presents and vouches for evidence in the second trial that repudiates the evidentiary basis for the first conviction. *See Green v. Georgia*, 442 U.S. 95 (1979); *Miller v. Pate*, 386 U.S. 1 (1967). Absent that evidentiary basis, a reviewing court can no longer trust that the conviction is reliable. More significantly, in a death penalty case, an uncorrected inconsistent theory presents a post-sentencing event that renders the sentencing determination itself unreliable. *See Johnson v. Mississippi*, 486 U.S. 578 (1988). Thus, the prosecutor's decision to embrace the theory that Wesley killed Mary Jane Stout, which included vouching for the veracity of Eastman's testimony before the jury, completely eroded the basis for Stumpf's conviction and sentence. Faced with an unreliable conviction and death sentence, the Sixth Circuit had no choice but to vacate both.

ARGUMENT

I. The Sixth Circuit correctly held Stumpf's guilty plea involuntary under *Boykin v. Alabama* and its progeny because the record as a whole does not fairly support a conclusion that Stumpf understood the true nature of the charge to which he pleaded guilty.

In *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969), this Court held that when a defendant pleads guilty the state shoulders the burden of building a record that demonstrates a voluntary, intelligent and knowing plea. In particular, the record must reveal that the defendant understood the law in relation to the facts, *Id.* at 243 n.5, and received "real notice of the true nature of the charge against him." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (citation omitted). In *Henderson*, this Court clarified that constitutionally sufficient notice will often necessarily include clear notice of the element of intent in certain serious offenses. *Id.* at 647 n. 18. Faced with a record that demonstrates that Stumpf never received "real notice of the true nature of the charge against him," the Sixth Circuit correctly held Stumpf's plea an invalid waiver of his constitutional rights.

Once Stumpf raised the voluntariness of his guilty plea as an issue, and pointed to evidence that supported that challenge, it fell to the state to counter this charge with its own evidence. *See Boykin*, 395 U.S. at 243. As the Sixth Circuit properly recognized, the state may meet its burden if it presents a record that contains counsel's representation, or some other indication, that all constitutionally relevant matters were adequately explained to the defendant. Such a record will generally enjoy a presumption of correctness. *Henderson*, 426 U.S. at 647; *see also Marshall v. Lonberger*, 459 U.S. 422, 437 (1983). However, if the record only adds to the doubt surrounding the guilty plea, then the presumption crumbles and the state must offer something

more. *Boykin*, 395 U.S. at 243. In this case, the Sixth Circuit's careful review of the record left no reasonable basis for sustaining the presumption. As the court noted, "[g]iven the paucity – indeed, the lack – of the evidence to refute what is clear on the record, we must conclude that the state has therefore not met its burden that the plea may stand." (Pet. App. 30-31a). With no other evidence of intent; indeed, faced with a great quantity of evidence that supported Stumpf's position, a position "inconsistent with the *charge* to which he pleaded guilty," (*Id.* at 28a (emphasis in original)), the Sixth Circuit had no choice but to reverse.

A. The Sixth Circuit correctly concluded that under Ohio law aggravated murder requires a finding of specific intent.

Stumpf was charged with aggravated murder under Ohio Revised Code § 2903.01 (1984), which requires a finding of specific intent. Section (D) of the statute provides that the requisite intent may not be inferred solely from the participation in a common plan or design; the prosecution still "must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt." As the Sixth Circuit noted, the Ohio judiciary has confirmed this construction of the statute. In *In re Washington*, the Supreme Court of Ohio reiterated that the requisite intent cannot be based solely on complicity. 691 N.E.2d 285, 287 (Ohio 1998). Thus, before an individual may be convicted of aggravated murder, the prosecution must offer proof of the defendant's specific intent to cause the death of the victim.

Stumpf was convicted of aggravated murder as the principal offender. That is, the prosecution met the specific intent element by offering a theory of the crime that turned on Stumpf firing the shots that killed Mrs. Stout. Thus, Stumpf's conviction rested upon the fact-finder's conclusion that Stumpf had harbored the requisite intent because he had pulled the trigger. Therefore, this case presented the Sixth

Circuit with a conviction that rested entirely upon one theory of the case, namely that Stumpf shot Mrs. Stout, and a long-standing challenge to the voluntariness of that plea based upon Stumpf's own version of the crime—a version subsequently confirmed by the state's own evidence at the Wesley trial.

Petitioner argues that the Sixth Circuit misconstrued the statute's specific intent requirement. Petitioner's argument may be summarized as, "If Stumpf could have been convicted of aggravated murder as an aider and abettor, then nothing else matters and the plea must stand." This "could have" argument, which Petitioner offers on both counts, will be addressed below, *see infra* at II.C, but here it is important to note that, in regards to the guilty plea count, Petitioner misses the Sixth Circuit's rather straight-forward logic, and assigns the court a far more ambitious goal then the court's reasoning supports.

Petitioner asserts that "the specific theory presented is irrelevant" because a defendant is convicted of a crime not a theory. (Pet. Br. at 33). While this is true as a matter of semantics, it is a startlingly meaningless assertion once a fact-finder adopts that theory of the case. The crime to which Stumpf pleaded guilty was aggravated murder. That crime required a finding of specific intent. The prosecutor offered, and the court accepted, that Stumpf harbored the requisite intent because he had been the principal offender—that is, the man who shot Mrs. Stout. At that moment, the "theory" became the "crime." The Sixth Circuit simply recognized that Stumpf's conviction rested entirely upon the theory that he was the principal offender.

The Sixth Circuit was not attempting to re-write Ohio's law of specific intent. Indeed, despite Petitioner's characterizations to the contrary, at no point does the Sixth Circuit conclude that because Stumpf was not the principal offender he could not have been convicted of aggravated murder. (*See, e.g.*, Pet. App. at 29a). Rather, the Sixth Circuit simply elucidated the statute and the theory under

which Stumpf was convicted because these factors supplied the necessary parameters to its review of the record. The Sixth Circuit understood that whether Stumpf's plea represented a valid waiver of his constitutional rights depended entirely upon whether the record could fairly support a conclusion that he voluntarily, knowingly and intelligently pleaded guilty to the crime as charged. Thus, whether Stumpf could have been convicted as an aider and abettor *if* the prosecutor had chosen to pursue that theory bears not at all on the inquiry into the validity of the plea. Stumpf was convicted as a principal offender; therefore, the record should support a voluntary, knowing and intelligent plea to being the principal offender.

B. The record does not fairly support a conclusion that Stumpf's guilty plea was voluntary, knowing and intelligent under this Court's precedents.

In *Boykin v. Alabama*, 395 U.S. at 242-43, this Court held that only a voluntary, knowing and intelligent guilty plea will stand as a legitimate waiver of a defendant's constitutional rights. The Court explicitly placed the burden for developing a record capable of meeting this necessarily high standard upon the state. *Id.* at 243 ("The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation."). The Court further advised that trial courts should endeavor to "[canvas] the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Id.* at 244. Thus, *Boykin* recognizes that only a full review of the charges, the nature of the plea, and the defendant's level of understanding of the proceeding and its consequence will adequately serve the interests of both the state and the defendant. The process of producing a well-developed record ensures that the plea reflects a voluntary, knowing and intelligent waiver of constitutional guarantees;

the record itself preserves the efficiencies of a guilty plea by "[forestalling] the spin-off of collateral proceedings that seek to probe murky memories." *Id.* In this case, the Sixth Circuit concluded that the trial court produced a record that details a pervasive and sustained confusion rather than a voluntary, knowing and intelligent waiver of Stumpf's constitutional rights.

1. Stumpf's plea was entered despite an abiding, obvious and uncorrected misunderstanding about the true nature of both the charged offense and the proceeding itself.

The Sixth Circuit determined that the record of the plea colloquy itself created a grave doubt as to whether Stumpf's guilty plea was voluntary, knowing and intelligent. The court reasoned, "when the state court record of a defendant's plea does not demonstrate that the plea is constitutionally valid, the state has the burden of showing the plea was voluntary, knowing and intelligent. Here, the state has presented no extrinsic evidence to counter the record of the proceedings . . . ." (Pet. App. at 30a). The court considered particularly significant Stumpf's obvious confusion about the nature of the proceedings, his desire to offer his version of the crime each time he was asked to acquiesce to the plea, and the fact that Stumpf's long-maintained version of the crime, the version he apparently wished to offer at the colloquy, contradicted the charge. In addition, the court also considered the ineffective assistance of counsel Stumpf received, his low IQ, and the Wesley trial. Against this, the state only offered counsel's confirmations during the colloquy that he had explained the charge to his client. In accord with *Boykin* and *Henderson*, the Sixth Circuit concluded that the state's failure to rebut the substantial evidence of an involuntary guilty plea with

anything other than the unclear and contradictory record itself mandated a finding of an invalid guilty plea.

a. Petitioner's argument that a confirmation in the record will be sufficient to counter any claim of involuntariness that is not based upon extrinsic evidence finds no support within the holding, reasoning or facts of *Henderson v. Morgan*.

The state enjoys an initial presumption that a guilty plea represented a voluntary, knowing and intelligent waiver when it presents the record of a defendant's plea proceedings. *Henderson*, 426 U.S. at 647; *Marshall*, 459 U.S. at 437. In Stumpf's case, Petitioner has offered no other evidence; it rests upon the transcript of the plea colloquy. Indeed, Petitioner argues that "defense counsel's representation on the record that he explained the elements of the offense to the defendant, especially where the defendant also acknowledges that his attorney so advised him, should be the end of the matter." (Pet. Br. at 30). Petitioner further argues that this presumption can only be overcome if "the defendant [shows] by competent, compelling extrinsic evidence that despite the record, he was not advised of the elements of the offense to which he pleaded guilty." *Id.* Thus, Petitioner argues that no matter what other evidence the record may contain, including obvious confusions and misunderstandings within the plea colloquy itself, a reviewing court must ignore these and look only to the various "Yes, sir's" scattered throughout the transcript. Such a standard comes close to an irrebuttable presumption and strays far from the standards established in *Henderson v. Morgan*.

Petitioner derives its strict standard from a misunderstanding of the facts in *Henderson*. *Henderson* does allude to a presumption of regularity for representations in

the record. 426 U.S. at 647. Petitioner argues that this presumption may only be met by "competent, compelling extrinsic evidence." Petitioner apparently bases this argument on her belief that *Henderson's* self-declared uniqueness stemmed from the fact that the *Henderson* petitioner "presented evidence *from his state court attorneys* that they 'did not explain the required element of intent.'" (Pet. Br. at 29, quoting *Henderson*, 426 U.S. at 642 (Petitioner's emphasis)). Petitioner mischaracterizes the facts. The *Henderson* court called the case unique because "the trial judge found as a fact that the element of intent was not explained to Respondent." 426 U.S. at 647. The portion of the opinion that Petitioner relies upon for the assertion that the petitioner in *Henderson* relied on evidence "*from his state court attorneys*" reads, "The lawyers gave Respondent advice about the different sentences which could be imposed for the different offenses, but, as the District Court found, did not explain the required element of intent." *Id.* at 642. Thus, the petitioner in *Henderson* did not rely on evidence from his state court attorneys, indeed the opinion contains no reference to such evidence, rather, the petitioner relied upon a district court's findings of fact following an evidentiary hearing on the issue of voluntariness. *Id.* at 640. Thus, by "competent, compelling extrinsic evidence" Petitioner apparently means a district court's findings of fact after a full evidentiary hearing.

In this case, Stumpf did not receive an evidentiary hearing. The Sixth Circuit, however, reviewed a record that included the same elements presented to the district court in *Henderson*, including: numerous affidavits from those with any knowledge of Stumpf's legal representation and plea decision, the transcripts of all relevant lower court proceedings, and psychological evaluations. Indeed, the Sixth Circuit had access to a joint appendix that ran to 2600 pages across five volumes. Exactly what "extrinsic evidence" Petitioner believes would fall beyond these parameters is unclear. Petitioner certainly cannot mean to

suggest that nothing short of a sworn admission of attorney incompetence will suffice to rebut the *Henderson* presumption. If this is indeed Petitioner's argument, she swings well wide of the mark.

It is clear that the *Henderson* presumption places a significant burden upon a defendant. However, contrary to Petitioner's interpretation, *Henderson* teaches that the presumption of voluntariness may be rebutted by evidence from the record as a whole. Thus, the record itself may create and sustain the doubt. However, that doubt must be pervasive and deep. As the Court stated in *Henderson*, "There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that Respondent had the requisite intent." *Id.* at 646. Thus, in a case like *Henderson* or Stumpf's, the essential point is not merely the fact that the record contains no clear indication that intent was explained; rather, the record should leave no principled means, within its four corners, of finding intent at all. Such a showing will demonstrate that the defendant very likely did not understand the nature of the charge, and indeed likely possessed a completely different understanding of the crime itself. Operating under such a misunderstanding, a defendant cannot voluntarily plead guilty to a crime under *Henderson*.

b. The Sixth Circuit discovered numerous points of unresolved confusion and contradiction in the record of the plea hearing itself, each of which supports the conclusion that Stumpf never understood the true nature of the charge to which he pleaded guilty.

The Sixth Circuit concluded that "the plea proceeding clearly demonstrates that the defendant did not possess an understanding of the aggravated murder charge to which he

pleaded guilty." (Pet. App. at 15-16a). The Sixth Circuit highlighted numerous points in the hearing that rendered it impossible to conclude that Stumpf understood the nature of the charge. Of particular significance is the fact that Stumpf interrupted the proceedings at the two most significant moments. When Judge Henderson initially asked Stumpf whether he understood that a guilty plea would constitute a waiver of his right to a jury trial, Stumpf's counsel answered, "Your honor, with reference to that, we have explained that to the defendant. He was going to respond but we have informed him that there is, after the plea, a hearing or trial relative to the underlying facts so that he is of the belief that there will be presentation of evidence and I wanted to make that clear to the Court with reference to his right of waiver of trial to Court." (*Id.* at 24a). The judge responded, "Of course in the sentencing portion of this trial you do have those rights to speak on your own behalf to present evidence and testimony on your own behalf . . . . Counsel, is that satisfactory?" (*Id.*). Thus, rather than confront Stumpf's confusion and guarantee clarity on this essential point, the court deflected the matter through a non-responsive reference to Stumpf's right to present mitigation evidence at sentencing.

When Judge Henderson proceeded to solicit the actual guilty plea from Stumpf, Stumpf once again bucked. Counsel explained to the court, "Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of his right to present evidence at a later time relative to his conduct, but he'll respond to that." (*Id.* at 25a). Once again, Judge Henderson invoked the sentencing hearing, "At no time am I implying that the defendant will not have the right to present evidence in mitigation hearing. . . . And I'm going to ask that the defendant, himself, respond to the question that I asked with that understanding that he has the right to present evidence in mitigation." (*Id.* at 26a). Thus, Stumpf expressed confusion at the two most important moments of

the colloquy, the two moments when he was being asked to waive a bundle of significant constitutional rights, and each time the confusion passed largely unaddressed and entirely uncorrected.

The Sixth Circuit reasonably concluded that this abiding confusion indicated that Stumpf "obviously, was reiterating his desire to challenge Petitioner's account of his actions, and had the procedure called for an immediate determination of the evidence relied upon by the state to support the defendant's imminent conviction, the misunderstanding would undoubtedly have come to light before the plea was finalized and Stumpf's fate was sealed." (*Id.*). The time to correct these misunderstandings and ensure a voluntary, knowing and intelligent plea was during the colloquy, that is, before the court accepted and entered the plea. The court and counsel allowed this moment to pass and proceeded to the evidentiary hearing on the back of an invalid guilty plea.

The fact that Stumpf offered a consistent account of the crime also contributed a great deal to the Sixth Circuit's interpretation of the plea hearing. This case does not present a silent defendant, who later claims that he did not understand, nor does this case present a defendant who pleads guilty while openly and simultaneously professing to contrary facts, *see, e.g., North Carolina v. Alford*, 400 U.S. 25 (1970), this case presents a defendant who continually expressed confusion over the course of the proceedings and consistently refused to admit to the shooting. As the Sixth Circuit expressed it, "[Stumpf's] qualification was more than temporary, and it was never addressed by the trial court." (Pet. App. at 27a).

Boykin and its progeny grant the state a presumption of voluntariness upon the presentation of a supporting record; therefore, it is incumbent upon the state to produce a sufficiently clear record. In this case, the state failed to address the rather glaring indications that Stumpf never intended, nor would he ever agree to plead guilty to shooting

the victim. Under *Boykin*, these circumstances cast serious doubt on the voluntariness of the plea, and absent significant evidence to the contrary, such a plea cannot stand. As the Sixth Circuit determined, the state offered no evidence of intent at the plea hearing beyond Stumpf's presence at the murder.[4] Given Stumpf's absolutely consistent position that he was not present at the shooting of the victim, as well as the numerous uncorrected confusions and contradictions at the plea hearing itself, the Sixth Circuit concluded that the record leaves no principled basis according to which a court could reasonably conclude that Stumpf received "real notice of the true nature of the charge against him."

2. Numerous facts and circumstances surrounding the plea also point to an invalid plea.

Following *Henderson*, the Sixth Circuit considered all the relevant facts and circumstances available in the record. *See* 426 U.S. at 647. The logic of a broad-based review is obvious. Only a review of the full record can provide the contextual moorings necessary to evaluate what weight specific evidence of either a knowing and intelligent plea or an unknowing and uninformed plea the reviewing court should grant.

The Sixth Circuit explicitly noted that the performance of Stumpf's counsel fell "outside the 'range of competence' to which the defendant is entitled." (Pet. App. at 32a, citing *Henderson*, 426 U.S. at 647). This finding is significant because it explains why the Sixth Circuit chose not to put much stock in defense counsel's confirmations on the record that they had explained the charge, its elements, and all available defenses to Stumpf. Indeed, the Sixth

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[4] The three-judge panel specifically found Stumpf to be the "principal offender" and offered no other findings on the element of intent. (J. App. at 196).

Circuit expresses wonderment and confusion at defense counsel's inexplicable choice to argue that Stumpf was not the shooter *after* allowing him to plea to the charge as the principal offender, and *after* allowing that plea to be accepted and entered by the court. (*Id.*). The Sixth Circuit also notes that regardless of whether this choice reflected ignorance of the elements of the crime or a decision to contest a requisite element *after* the conviction, such actions "manifestly constitute ineffective assistance." (*Id.*)

The Sixth Circuit also took into account the fact that Stumpf "has a low IQ and has been found to be mentally and emotionally immature." (*Id.* at 23a). This finding is significant because it renders the obvious confusions and contradictions in the transcript that much more worrisome. Indeed, this factor was specifically listed as one of the "unique" elements in *Henderson* that the court listed in response to the state's "exaggerated" fear that the decision would invite a flood of collateral attacks. 426 U.S. at 647.

The fact that the state itself developed, substantiated and presented evidence that offered proof that Stumpf was not the principal offender also informs the Sixth Circuit's review of the record. The prosecutor's case at Wesley's trial, coupled with Stumpf's unwavering account of the crime, supports the Sixth Circuit's conclusion that the problems in the record likely indicate that Stumpf never understood the true nature of the charges. More significantly, the full weight of the evidence, colored by the revelations at Wesley's trial, "[point] to the existence of at least a reasonable probability that [Stumpf] would not have pleaded guilty had he known that such a plea would have amounted to admitting that he specifically intended the death of Mary Jane Stout." (Pet. App. at 33a). This is perhaps the most startling aspect of this case. Petitioner's contention that Stumpf's plea was consistent regardless of what theory it reflected finds no support in the record. An honest and reasonable appraisal of the record in its entirety tends to indicate the exact opposite; that is, Stumpf likely could not have been convicted of the

aggravated murder of Mrs. Stout under his version of the crime. *See infra* at II.3.

II. The Sixth Circuit correctly held that Stumpf's due process rights were violated when the State convicted and sentenced him to death based on a factual theory that the State later repudiated in prosecuting Stumpf's accomplice.

This Court has never looked favorably upon prosecutors asserting inconsistent theories to secure convictions or death sentences against multiple defendants. This Court's precedents dictate that when a material inconsistency occurs, a defendant's rights under the Fourteenth Amendment's Due Process Clause are threatened. In such cases, this Court has consistently required a meaningful inquiry to determine whether the defendant's conviction or sentence were nonetheless fair and reliable. In the present case, the prosecutor secured Stumpf's conviction and death sentence by repeatedly arguing that Stumpf shot and killed Mrs. Stout, a fact that the sentencing court found to be especially significant in sentencing him to death. In the subsequent trial of Wesley, the same prosecutor relied on newly discovered evidence to argue just the opposite: that Wesley, not Stumpf, was the shooter. This Court should affirm the Sixth Circuit's decision that it is fundamentally unfair and a violation of Stumpf's rights under the Due Process Clause to allow his conviction and sentence to stand.

A. Due process requires that a defendant's conviction and sentence be re-evaluated when the prosecutor has repudiated the theory and evidence used to secure the original conviction and sentence.

Recognizing that a prosecutor's inconsistent positions can arise under a number of different factual patterns, this

Court has consistently tailored meaningful remedies to cure the constitutional errors in such cases. For instance, this Court clearly disapproved of inconsistent theories in *Green v. Georgia*, 442 U.S. 95 (1979). In that case, this Court rebuffed a prosecutor's attempt to manipulate the rules of hearsay to prevent a defendant from presenting evidence that the prosecutor previously used to convict another defendant of the same crime. *Id.* at 97. In *Green*, the State of Georgia obtained a conviction and death sentence against one defendant, Moore, for the murder of Allen. *Id.* at 96. Subsequently, Green was also convicted for the murder of Allen. *Id.* During his sentencing hearing, Green attempted to introduce the testimony of Pasby, who stated that Moore told him that he killed the victim. *Id.* This evidence would demonstrate that Green did not participate in the killing. *Id.* Although the State had presented Pasby's testimony in Moore's trial, the State objected to the evidence at Green's trial on hearsay grounds. *Id.* This Court reversed Green's death sentence, holding that the exclusion of Pasby's testimony constituted a violation of the Due Process Clause. *Id.* at 97. The testimony was "highly relevant to a critical issue in the punishment phase of the trial" and there was "ample" evidence corroborating Moore's statement to Pasby. But, "*[p]erhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it.*" *Id.* at 97 (emphasis added). Thus, this Court concluded that the rules of hearsay could not be applied in that manner because it "defeats the ends of justice" to which the Due Process Clause necessarily protects. *Id.*

This Court also condemned a prosecutor's use of inconsistent theories in *Miller v. Pate*, 386 U.S. 1 (1967), a case involving a prosecutor's knowing use of false testimony. In *Miller*, the prosecutor's entire theory of the case centered on proving that a pair of red-stained shorts belonged to the defendant and that the stain was the victim's blood. *Id.* at 3. During the federal habeas proceedings, however, it was

revealed that the stain was in fact paint and that the prosecutor knew of this fact at the time of trial. *Id.* at 5. The State then argued during the habeas proceedings that everyone at trial knew the shorts were stained with paint, but this Court rejected this incredible argument and reversed the defendant's conviction. *Id.* at 6-7. Thus, *Miller* reflects the principle that the prosecutor cannot present evidence to support a conviction and then argue to a reviewing court that the evidence did not matter.

Green and *Miller* illustrate this Court's intolerance of prosecutorial attempts to subvert the truth-finding function of a criminal trial. As this Court made clear long ago, "[c]ourt proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." *Estes v. Texas*, 381 U.S. 532, 540 (1965). This truth-seeking function of criminal trials is protected, in part, by the Due Process Clause, *see, e.g., United States v. Agurs*, 427 U.S. 97, 107 (1976) (presenting false testimony "involve[s] a corruption of the truth-seeking function of the trial process"). Thus, this Court has encountered a number of factual patterns involving the subversion of the truth-seeking function of trials and held that the defendant's rights under the Due Process Clause were implicated.[5]

Just as with these fact patterns, a prosecutor's ability to maintain verdicts based on materially inconsistent theories undermines the truth-finding process. When the prosecutor

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[5] *See Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986) (improper argument and manipulation or misstatement of evidence); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (use of hearsay rule to exclude evidence of the prosecutor's inconsistency in successive capital sentencing hearings); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (suppression of material impeachment evidence); *Miller v. Pate*, 386 U.S. 1, 6 (1967) (presentation of false evidence and inconsistent argument on appeal); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression of materially exculpatory evidence); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (failure to correct false testimony); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (knowing presentation of false testimony); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (same).

attempts to maintain two convictions despite the fact that the core evidence presented in support of the first defendant's conviction or death sentence is wholly irreconcilable with the core evidence used against a second defendant charged with the same crime, he offends the truth-finding process. Allowing both verdicts to stand contradicts the principal goals of convicting the guilty and freeing the innocent and severely undermines the basic fairness of criminal trials. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (recognizing "the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence"); *Berger v. United States*, 295 U.S. 78, 88 (1935) (describing the "twofold aim of [the law] that guilt shall not escape nor innocence suffer").

Furthermore, the use of inconsistent theories to convict different defendants falls well below the unique constitutional standards that this Court has applied to prosecutors. As this Court has long recognized, "the prosecutor's role transcends that of an adversary." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985). In *Berger v. United States*, 295 U.S. at 88, this Court firmly stated that a prosecutor

> is the representative not of an ordinary party to a controversy but of a sovereignty ... whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done. ... He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Certainly when a prosecutor seeks to maintain a verdict that *he* has deemed to be false in another proceeding, he does not fulfill his constitutional duty to refrain from improper methods of producing a conviction. Without being required to correct a verdict, a prosecutor would be free to let stand a material deception on the courts. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (requiring a prosecutor to correct false testimony even when the testimony is not solicited); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (condemning the deliberate deception of the court). Furthermore, such a rule would authorize prosecutors to abandon their ethical duty to "seek justice, not merely to convict." Model Code of Professional Responsibility EC 7-13. A prosecutor who knows he has no duty to correct an inconsistent verdict will not be discouraged from obtaining other convictions, though he knows both defendants cannot be simultaneously guilty. In short, preventing prosecutors from maintaining inconsistent prosecutions is necessary to prevent criminal trials from becoming "a game in which the State's function is to outwit and entrap its quarry" rather than a search for the truth. *Giles v. Maryland*, 386 U.S. 66, 100 (1967) (Fortas, J., concurring).

The rule against inconsistent theories applies with equal force to death sentences. *See Bullington v. Missouri*, 451 U.S. 430, 446 (1981) (stating that a capital sentencing hearing is like a trial on the question of guilt or innocence because the prosecution has "the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts"); *Green*, 442 U.S. at 97 (Court troubled by use of hearsay rules to further an inconsistent theory during a capital sentencing hearing). As this Court has repeatedly stated, the Constitution requires heightened reliability for the death penalty determination. *See, e.g., Johnson v. Mississippi*, 486 U.S. 578, 584 (1988); *Turner v. Murray*, 476 U.S. 28, 35-36 (1986); *California v. Ramos*, 463 U.S. 992, 998 (1983). If a prosecutor's newly discovered evidence is materially inconsistent with the

evidence previously presented to secure a death sentence, that sentence does not meet this Court's standard of reliability, and it must be corrected.

The legal principle that post-sentence events can render a death sentence constitutionally unreliable is firmly rooted in this Court's decisions. In *Johnson v. Mississippi*, 486 U.S. 578, 582 (1988), one of the defendant's prior felonies that formed the basis for an aggravating factor was invalidated after the death sentence was imposed. Thus, this Court held that the defendant was entitled to a new sentencing hearing because "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Id.* at 590. Furthermore, the evidence of the conviction prejudiced the defendant because the prosecutor "repeatedly urged the jury to give it weight in connection with its assigned task of balancing aggravating and mitigating circumstances." *Id.* at 586. Like the reversal of the New York conviction in *Johnson*, a prosecutor's total repudiation of an earlier theory renders the evidence from the first case "materially inaccurate." This creates an impermissible risk that a defendant has been sentenced to death arbitrarily, and this Court's precedent dictates that the defendant is entitled to a new sentencing hearing.

This rule against inconsistent theories does not necessarily mean that a prosecutor must select a version of the facts and thereby become forever bound by that version of events. Where the evidence is ambiguous regarding a material fact, the prosecutor certainly acts within constitutional bounds by asserting the ambiguity to a fact-finder. The prosecutor may not, however, manipulate the ambiguous evidence to obtain multiple convictions.

Furthermore, a prosecutor's hands are not tied in the event that he discovers new evidence that is inconsistent with his theory in the original case. Indeed, the prosecutor may use that evidence to secure a second verdict. In doing so, however, he is deemed to believe that the new evidence is reliable (in light of the earlier inconsistent evidence and the

prosecutor's constitutional duty to refrain from knowingly presenting false evidence). In that case, where the prosecutor has wholly repudiated the theory upon which he secured the earlier verdict, the first defendant is entitled to a due process inquiry to ensure that the result of his proceeding is a correct and just one. *See Mooney*, 294 U.S. at 113 (rejecting the State's argument that it was "not required to afford any corrective judicial process to remedy the alleged wrong."); *see also Thompson v. Calderon*, 120 F.3d 1045, 1071 (9th Cir. 1997) (en banc) (Kozinski, J., dissenting) ("In the case of mutually inconsistent verdicts, . . . I believe that the state is required to take the necessary steps to set aside or modify at least one of the verdicts.").

The Sixth Circuit properly decided to apply the same standard of review applied in other cases involving due process violations based upon a potentially tainted truth-finding process. (Pet. App. at 45a). *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Bagley*, 473 U.S. at 682. Under this standard, a court inquires whether there is a reasonable probability that, had the evidence been presented, the outcome of the proceeding would have been different. As this Court explained in *Kyles*, 514 U.S. at 434, this standard does not require a defendant to demonstrate that the evidence would have resulted in a complete acquittal. Nor does this standard inquire into whether the remaining evidence would have been sufficient to sustain the verdict. *Id.* at 434-35. Instead, the question is "whether in [the] absence [of the evidence] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434. Thus, a reasonable probability is shown when the evidence "undermines confidence in the outcome of the trial." *Id.* Where a defendant's conviction or death sentence is based on evidence and argument that conflicts with the evidence and argument used by the prosecutor to secure the conviction of a second defendant, a court should be required to inquire whether the outcome of the first defendant's trial has been

undermined by the material inconsistency. If so, then the defendant is entitled to a new sentencing hearing or trial.

In her brief to this Court, Petitioner mischaracterizes both the nature of the constitutional violation that results from an uncorrected use of inconsistent evidence and theories as well as the applicable standard of review. First, Petitioner reduces the issue to "some species of 'actual innocence' claim" in the mold of *Herrera v. Collins*, 506 U.S. 390 (1993). (Pet. Br. at 42). However, these claims differ markedly. In *Herrera*, this Court held that a defendant's claim of actual innocence was not cognizable in federal habeas absent an independent constitutional violation. *Id.* at 393. In an inconsistent theories case, however, the aggrieved defendant's claim is not that he is actually innocent of the crime. Instead, the claim is that if the defendant's verdict is allowed to stand, the prosecutor will have obtained two convictions on wholly inconsistent theories in violation of the Due Process Clause. The State's interest in finality—which compelled this Court's decision in *Herrera*, 506 U.S. at 417; *see also id.* at 426 (O'Connor, J., concurring)—is simply non-existent when it is *the prosecutor* who obtains new evidence and, finding it reliable, uses it to convict a second defendant on a theory that is irreconcilable with the first defendant's conviction.

When a prosecutor presents evidence at a criminal trial, that evidence is more constitutionally significant than evidence brought forth by a defendant to support a post-trial claim of actual innocence. First, when a prosecutor presents evidence at a trial, the fact-finder will not view with the same degree of skepticism that will greet evidence presented by a defendant on Death Row protesting his innocence. *See id.* at 423 (O'Connor, concurring) ("It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him."). Also, when the prosecutor introduces evidence against a defendant, that evidence is subject to the scrutiny of opposing counsel and a finder of fact and thus, he puts the credibility of the State behind that position. *See*

United States v. Young, 470 U.S. 1, 18 (1985) (recognizing that "the prosecutor's opinion carries with it the imprimatur of the government"). In addition, the prosecutor has a constitutional duty to refrain from knowingly introducing false testimony and to correct testimony learned to be false, *Napue*, 360 U.S. 264, 269 (1959); *Mooney*, 294 U.S. 103, 112 (1935), as well as a number of ethical duties to promote the search for the truth. *See* Bennett L. Gershman, *The Prosecutor's Duty to the Truth*, 14 GEO. J. LEGAL ETHICS 309, 313 (2001). Thus, this Court's decision in *Herrera* presents no hurdle to the due process claim asserted in this case.

Petitioner also applies the incorrect standard of review for due process violations by arguing simply that Stumpf *could have been* convicted of aggravated murder and sentenced to death, even under his version of the events. (Pet. Br. at 36). This argument, however, does not follow the "reasonable probability" standard for assessing due process violations. In *Kyles*, 514 U.S. at 434-35, this Court affirmed that a defendant "need not demonstrate after discounting the [excluded evidence], there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." This standard was similarly described in *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963) (emphasis added), in which this Court held, "*We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of.* The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Therefore, as this Court has indicated, it is irrelevant whether a defendant *could have been* convicted and sentenced to death anyway. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 289-90 (1999); *Bagley*, 473 U.S. at 682.

The Sixth Circuit's conclusion that a prosecutor's use of wholly inconsistent theories to obtain verdicts against

multiple defendants violated the Due Process Clause is reinforced by other circuit courts that have similarly applied this Court's precedent.[6] Other judges,[7] commentators,[8] state courts,[9] and two members of this Court[10] have reached the same conclusion. This Court should make this trend law.

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[6] *Smith v. Groose*, 205 F.3d 1045, 1051 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc), *rev'd on other grounds*, 523 U.S. 538, 566 (1998). *But see Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995) (prosecution's theories not inconsistent because both defendants could have been convicted under the law of parties). A number of other circuit court decisions have addressed the issue but did not find an inconsistency based on the facts of the particular cases. *See, e.g., Shaw v. Terhune*, 380 F.3d 473 (9th Cir. 2003); *United States v. Dickerson*, 248 F.3d 1036 (11th Cir. 2001); *Nguyen v. Lindsey*, 232 F.3d 1236 (9th Cir. 2000). Some federal courts have addressed the issue on an evidentiary level, requiring the admission into evidence of a prosecutor's prior inconsistent arguments. *See United States v. Salerno*, 937 F.2d 797, 811-12 (2d Cir. 1991); *United States v. Kattar*, 840 F.2d 118, 131 (1st Cir. 1988); *United States v. Bakshinian*, 65 F. Supp. 2d 1104, 1109 (C.D. Calif. 1999).

[7] *Thompson*, 120 F.3d at 1063 (Tashima, J., concurring) (finding a due process violation but requiring a finding of which theory is true); *id.* at 1071 (Kozinski, J., dissenting) ("In the case of mutually inconsistent verdicts, ... I believe that the state is required to take the necessary steps to set aside or modify at least one of the verdicts."); *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring) ("Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for truth."); *United States v. Butner*, No. 98-00174-01-CR-W-1, 2000 U.S. Dist. LEXIS 18005 (W.D. Mo. Nov. 14, 2000).

[8] *See, e.g.*, Barry Tarlow, *RICO Report: More Prosecutorial Double-Speak*, 27 CHAMPION 52, 61 (2004); Steven F. Shatz & Lazuli M. Whitt, *The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants*, 36 U.S.F. L. REV. 853 (2002); Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423 (2001); Michael Q. English, *Note: A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 FORDHAM L. REV. 525 (1999).

[9] *In re Sakarias*, No. S082299, 2005 Cal. LEXIS 2309 (Cal. March 3, 2005); *State v. Gates*, 826 So. 2d 1064 (Fla. Dist. Ct. App. 2002).

B. The prosecutor's evidence and theory at Wesley's trial were materially inconsistent with the evidence and theory used to convict and secure the death sentence for Stumpf.

During both Stumpf's guilty plea hearing and sentencing hearing, the prosecutor argued vigorously that Stumpf shot and killed Mrs. Stout. *See supra* at 8-9. After Stumpf had been convicted and sentenced to death, the prosecutor discovered new evidence from Wesley's cellmate, Eastman, that showed Wesley was the actual shooter. *See supra* at 10. The prosecutor repudiated his earlier theory and sought a conviction and death sentence against Wesley for shooting Mrs. Stout. *See supra* at 9-10. To use Eastman's testimony in this way, the prosecutor clearly considered it reliable evidence that Wesley—and not Stumpf—shot Mary Jane Stout. *See Green v. Georgia*, 442 U.S. at 97 (describing the prosecutor's obvious belief in the reliability of evidence used to sentence a defendant to death); *Alcorta*, 355 U.S. at 31 (1957) (forbidding the prosecution's knowing presentation of false testimony). Thus, the Sixth Circuit correctly found that the prosecutor asserted inconsistent theories in violation of the Due Process Clause.

Despite the glaring inconsistencies, Petitioner first argues that the prosecutor's positions were consistent because the state *could have* prosecuted Stumpf for aggravated murder under an aider and abettor theory. This argument is addressed *supra* at A.1 and *infra* at B.3. The relevant consideration, however, is not what the state could have argued, it is what the state did argue.

Petitioner next argues that the theories are consistent because the prosecutor also argued that Wesley could be

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[10] *Jacobs v. Scott*, 513 U.S. 1067 (1995) (Stevens, J., dissenting from denial of *certiorari*).

convicted and sentenced to death as an aider and abettor. Petitioner's argument on this point consists of a single paragraph and reduces to this assertion, "[I]n closing, the prosecutor, recognizing that the jury may not find a jailhouse informant credible, expressly argued that Wesley was guilty *either* as the shooter *or* because of his criminal complicity in Stumpf's actions." (Pet. Br. at 37). While it is true that the prosecutor talked to the jury about the aider and abettor option during closing arguments at the guilt phase, the transcripts of the Wesley trial demonstrate that the prosecutor's position throughout the trial was that Wesley was the principal offender.

The prosecutor took the position that Wesley was the actual shooter and he shaped his entire case to support that position. *See supra* at 9. Clearly, the prosecutor believed that Eastman's testimony and the other evidence were sufficient to prove beyond a reasonable doubt that Wesley had been the principal offender. The prosecutor's case, however, ran up against Defense Exhibits 2 and 3 – Stumpf's guilty plea and death sentence. Defense counsel referred to these exhibits numerous times during the trial. (Wesley Trans. 3152-53, 3155, 3157, 3158, 3163, 3165, 3326, 3331, 3335, 3339). Indeed, this appears to have been defense counsel's primary strategy. Confronted with Exhibits 2 and 3, and defense counsel's argument that Stumpf's plea necessarily meant that he shot Mrs. Stout, the jury refused to find Wesley guilty of the principal offender specification. After the jury rebuffed the prosecutor's primary theory, the prosecutor had no choice but to revert to his fallback position, aider and abettor, in order to attempt to secure the death penalty for Wesley. Although the prosecutor was willing to convict and execute two different men for shooting the same victim, even though there is no dispute that only one of the men actually shot the victim, the jury was not; it elected the least severe of the available penalties for Wesley.

C. There is a reasonable probability that Stumpf would not have been found guilty of aggravated murder and would not have been sentenced to death in light of the prosecution's inconsistent positions.

As described above, once a court finds that the prosecutor has presented materially inconsistent positions, it should then consider the prejudice resulting from the inconsistency. Specifically, the court should evaluate whether there is a reasonable probability that the results of the first trial and sentencing hearing would have been different if the State had utilized the same theory and evidence it employed in the second trial and sentencing hearing. As explained below, the answer to both questions in Stumpf's case is "yes."

1. There is a reasonable probability that Stumpf would not have been convicted of aggravated murder.

Petitioner contends that Stumpf may not challenge his conviction because he pleaded guilty to the charges against him, comparing Stumpf's case to *Mabry v. Johnson*, 467 U.S. 504 (1984). This argument, however, is flawed because Stumpf's claim does not rest upon procedural defects in the plea itself but rather the constitutional error that occurred at the motion to withdraw the plea or vacate the death sentence. At that time, the three-judge panel failed to remedy the constitutional error resulting from the prosecutor's repudiation of the theory he had used against Stumpf. As this Court has explained, when a defendant has pleaded guilty, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior to the entry of the guilty plea.*" *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (emphasis added). Because Stumpf's due process claim is not the type of "antecedent" challenge to a

guilty plea that this Court has foreclosed in other cases, the claim is cognizable in a federal habeas proceeding. *See, e.g., Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974) (upholding a vindictive prosecution claim despite a plea of guilty).

In cases involving a guilty plea, a due process challenge to the conviction requires the defendant to show "that there is a reasonable probability that … he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In this case, there is a reasonable probability that the three-judge panel would have rejected Stumpf's plea of guilty to aggravated murder charges if it had considered Eastman's testimony.

As described above, one of the required elements of aggravated murder in Ohio is that a defendant must be "specifically found to have intended to cause the death of another." OHIO REV. CODE § 2903.01(D). Petitioner's argument hinges on the fact that the prosecution is not required to prove that the defendant was the actual shooter. While this fact is true—the Sixth Circuit also noted this fact, (Pet. App. at 29a)—Petitioner ignores other aspects of Ohio law. The Ohio aggravated murder statute describes a number of circumstances from which fact-finders may infer specific intent to kill, such as a defendant's participation "in a common design with others to commit the offense by force or violence." OHIO REV. CODE § 2903.01(D). However, the statute also states that "the inference is nonconclusive" and that a fact-finder must consider *all* evidence, including the defendant's lack of intent to kill. *Id.* Although it is possible that specific intent may be inferred from, for example, a common design, a fact-finder cannot ignore strong evidence that negates specific intent. *In re Washington*, 691 N.E.2d 285, 287 (Ohio 1998), a case heavily relied upon by Petitioner, reaffirms this proposition, stating, "[i]n weighing the evidence, the fact-finder remains bound to consider all evidence of the defendant's intent to kill, including the defendant's evidence on lack of intent to kill."

During Stumpf's guilty plea hearing, the prosecution's primary evidence of Stumpf's specific intent to kill Mrs. Stout was its argument that Stumpf actually committed the shooting. (Pet. App. at 45-46a). Responding to Stumpf's challenge to the element of intent, the prosecutor stated, "as to a purpose to kill, whoever shot Mrs. Stout didn't intend to do her any favors when he shot her four times. It seems to me that shooting a person four times shows what your intent was." (J. App. at 163-64). In light of Eastman's testimony that Stumpf did not shoot Mrs. Stout, the State's case for specific intent falls apart.

Although Petitioner points to other circumstances from which Stumpf's specific intent could be inferred, the inferential links are weak. Petitioner argues that because Stumpf shot Mr. Stout, "[i]t would be surprising, and perhaps inconceivable, that Stumpf … would have objected to killing Mrs. Stout." (Pet. Br. at 25). Petitioner argues that Stumpf would not have "objected" to killing Mrs. Stout because she was a witness to the robbery and attempted shooting. However, the prosecution's evidence indicated that Stumpf shot Mr. Stout only after a struggle that began when Mr. Stout lunged at Stumpf. The fact that Stumpf did not initiate the physical struggle with Mr. Stout prior to his shooting suggests a lack of specific intent to kill Mrs. Stout. In addition, according to Eastman, Stumpf "panicked" and dropped the gun after shooting Mr. Stout. (J. App. at 241). Furthermore, he was not even present in the house when Wesley shot Mrs. Stout. (Cir. Ct. App., Vol. IV, at 2137). In short, almost no evidence that Stumpf specifically intended to kill Mrs. Stout exists.

Thus, there is a reasonable probability that Stumpf would not have been found guilty of aggravated murder if he had proceeded to a trial. Although other evidence exists to allow an inference of Stumpf's specific intent, a fact-finder could not have ignored the other evidence indicating that Wesley shot Mrs. Stout after Stumpf panicked and left the house. This evidence, adduced at Wesley's trial, certainly

undermines confidence in the outcome of Stumpf's trial and renders his conviction a violation of due process.

2. There is a reasonable probability that Stumpf would not have been sentenced to death.

As noted above, Petitioner is only raising before this Court the question of whether the Sixth Circuit erred in vacating Stumpf's guilty plea as a result of the prosecutor's use of inconsistent theories and evidence in Wesley's case. Petitioner has not challenged the Sixth Circuit's additional conclusion that Stumpf is also entitled to relief as to his death sentence, and so has not addressed the impact of the prosecutor's use of inconsistent theories on Stumpf's death sentence. The State's acquiescence in this regard is understandable because, as described above, it is clear that the primary basis for the three-judge panel's decision to sentence Stumpf to death was its acceptance of the prosecutor's theory and evidence that Stumpf was the actual shooter. Specifically, during the mitigating phase, both the prosecutor and defense counsel argued at length about whether Stumpf had in fact shot Mrs. Stout. Defense counsel attempted to prove, as mitigation under OHIO REV. CODE § 2929.04(B)(6), that Stumpf was not the principal offender in the offense. (J. App. at 176-80). However, as described above the prosecutor repeatedly challenged this argument, stating, for example, there was "ample, ample evidence in this record to make the reasonable inference that this defendant shot both individuals." (J. App. at 187). *See supra* (describing the prosecutor's reliance on the theory that Stumpf was the actual shooter).

Furthermore, the three-judge panel accepted the prosecutor's theory that Stumpf shot Mrs. Stout, citing as its first reason for sentencing Stumpf to death the fact that "[t]he Court finds beyond a reasonable doubt that the Defendant was the principal offender in count one of the indictment."

(Pet. App. at 219a). The importance of the prosecutor's theory in securing Stumpf's death sentence was underscored when Judge Bettis, one of the original members of the sentencing panel, stated at the hearing on Stumpf's motion to withdraw his guilty plea or, in the alternative, to set aside his death sentence:

> If we had not been satisfied that Stumpf was, in fact, the trigger man, the principal offender, and we were satisfied that he was, in fact, an aider and abettor, that may very well have had an effect upon this Court's determination of whether the death penalty should follow. I'm not saying it would, but it's possible.

(Pet. App. at 275a). The important role that this finding played in the sentencing panel's decision to impose the death sentence was likewise recognized by the district court, (Pet. App. 90a) ("a very substantial reason"), as well as the Sixth Circuit. (Pet. App. at 46a).

Petitioner, depending on which conviction she is trying to obtain or maintain, has argued that Eastman's testimony is simply not credible. First, as discussed above, this type of duplicitous argument is foreclosed by this Court's decision in *Green v. Georgia*, 442 U.S. at 97.[11] Furthermore, the fact that Wesley was not sentenced to death does not mean that the Wesley jury considered Eastman's testimony on a clean slate and found it not credible. During the trial, Wesley's attorney presented evidence to the jury that Stumpf already had pleaded guilty and had been sentenced to death for the aggravated murder of Mrs. Stout. (Wesley Trans. at 3152). During closing arguments, Wesley's counsel

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[11] It is important to recall that the Ohio Supreme Court refused to consider Eastman's testimony because it was hearsay. (Pet. App. 173a). This is precisely the basis upon which this Court reversed the defendant's death sentence in *Green v. Georgia*, 442 U.S. 95, 97 (1979).

repeatedly referred to Stumpf's plea as an admission that Stumpf killed Mrs. Stout. He stated, for instance, "[Wesley] didn't intend to kill her. He didn't kill her. John David Stumpf did. Those entries show it." (*Id.* at 3163). At the end of his closing argument, he said,

> I submit to you that Mrs. Stout's death has come to justice by the plea of the person who pleaded guilty to the charge of aggravated murder, John David Stumpf, and those entries will show to you the sentence he received—the death penalty—and also his admission of the involvement of the shooting two time by the evidence of Mr. Stout. He pleaded guilty to those things.

(*Id.* at 3165). In light of this evidence, it cannot be seriously contended that an open-minded fact-finder found Eastman to be unbelievable. The jury's assessment of his testimony was eclipsed by the overwhelming evidence that the actual killer already was on Death Row and thus, justice had been done.

It is, of course, not surprising that the prosecutor relied so heavily on the theory that Stumpf was the shooter in attempting to secure the death penalty, or that the three-judge panel cited its acceptance of the prosecutor's theory as being its first reason for sentencing Stumpf to death. As the Ohio Supreme Court recently observed, "[v]ery few sentences have been approved against persons who were not the principal offender." *State v. Green*, 738 N.E.2d 1208, 1224 (Ohio 2000). In fact, nationwide statistics indicate that the death penalty is rarely imposed when the defendant does not actually kill the victim. *See Death Row U.S.A.*, Sept. 1, 1999, at 20 (showing that only 2.8 percent of all persons executed in the United States between 1976 and 1999 were not the "triggerman" in the crime); *Enmund v. Florida*, 458 U.S. 782, 795 (1982) (noting a study concluding that only 5.5

percent of the persons sentenced to death at the time "did not participate in the fatal assault of the victim").

In this case, if a reasonable sentencing panel had learned of Eastman's testimony, the evidence would have demonstrated at best that Stumpf was an aider and abettor to Mrs. Stout's murder. As this Court recognized in *Lockett v. Ohio*, 438 U.S. 586, 608 (1984), in which the defendant did not kill the victim, the degree of participation in an offense is precisely the type of evidence that can justify a sentence less than death. *See also Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring) (stating that the death penalty is less justified for defendants who played a relatively less significant role in the murder). The Ohio Supreme Court also has found the fact that a defendant was not the principal offender to be "a powerful mitigating factor." *State v. Green*, 738 N.E.2d 1208, 1224 (Ohio 2000). Perhaps the best proof of this is that Wesley's jury, which found Wesley to be an aider and abettor to Mrs. Stout's murder, gave Wesley the least severe of the possible sentences.

Finally, the Ohio Supreme Court's independent review of Stumpf's death sentence, (Pet. App. at 172-73a), simply could not cure the constitutional error resulting from the prosecutor's pursuit of inconsistent prosecutions. While this Court has upheld appellate reweighing as a remedy for consideration of an invalid aggravating factor, *Clemons v. Mississippi*, 494 U.S. 738, 744 (1990) (rejecting the petitioner's claim that "it is constitutionally impermissible for an appellate court to uphold a death sentence imposed by a jury that has relied in part on an invalid aggravating circumstance"), it has never held that appellate reweighing suffices to cure a due process violation that occurs during sentencing. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 394-95 (2000) (applying the reasonable probability standard to the prejudice prong of a claim of ineffective assistance of counsel at the capital sentencing phase). Thus, the Ohio Supreme Court's reference to Eastman's testimony when conducting its independent weighing and proportionality

review did not remedy the constitutional error corrupting Stumpf's death sentence.

Furthermore, the fact that the Ohio Supreme Court found Eastman's testimony "of minimal credibility," (Pet. App. at 173a), has little impact in these habeas proceedings. First, the logic supporting that finding is contrary to the rationale underlying this Court's decision in *Green*, 442 U.S. at 97, where the testimony the defendant wished to present was obviously reliable because the prosecutor used it as its key evidence to secure an earlier death sentence. In this case, the same prosecutor used Eastman's testimony as key evidence in its attempt to procure an aggravated murder conviction and death sentence against Wesley. Furthermore, credibility determinations made by appellate courts are not the types of findings generally entitled to deference under 28 U.S.C. § 2254(d). *See Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) ("a reviewing court, which analyzes only the transcripts ..., is not as well positioned as the trial court is to make credibility determinations"); *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1976).

Even if the Ohio Supreme Court was entitled to make a credibility determination, however, its finding was based on clearly erroneous factual assumptions. Specifically, the Ohio Supreme Court explained that it found Eastman's testimony "of minimal credibility, especially in light of [Stumpf's] guilty plea and the substantial evidence to the contrary adduced during [Stumpf's] sentencing hearing." (Pet. App. at 173a). With regard to the former, even Petitioner has conceded that the fact that Stumpf pleaded guilty to aggravated murder was "factually and legally consistent" with Eastman's testimony that Stumpf was not the person who shot and killed Mrs. Stout. (Pet. Br. at 25). To put it differently, Stumpf's guilty plea in no way undercut the credibility of Eastman's testimony that Wesley was the shooter. The Ohio Supreme Court's discounting of Eastman's testimony due, in large part, to Stumpf's guilty

plea, was, therefore clearly erroneous and not supported by the record.

The Ohio Supreme Court's second basis for discounting Wesley's testimony—that there supposedly was "substantial evidence" that Stumpf was the shooter—is similarly lacking support in the record. In fact, although the evidence shows that Stumpf possessed the gun before and after the victim was shot and killed, there is absolutely no evidence that Stumpf had the gun when Mrs. Stout was shot and killed. To the contrary, the only evidence on this point at Stumpf's sentencing hearing was Stumpf's testimony that he panicked and dropped the gun after shooting Mr. Stout, evidence which is entirely consistent with Eastman's testimony. (Pet. App. at 44a n.11). Therefore, because "the record in the State court proceeding, considered as a whole, does not fairly support such factual determination," it is not entitled to deference by this Court. 28 U.S.C. § 2254(d)(8). *See also Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (declining to grant deference to state court findings based in part on erroneous and unsupported assumptions); *Parker v. Dugger*, 498 U.S. 308, 316, 320 (1991) (refusing to grant deference to a state court finding that the trial court found no mitigating circumstances because the finding was "against the weight of the evidence" and "not fairly supported by the record"). Accordingly, the Sixth Circuit's decision should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Sixth Circuit.

Respectfully submitted,

ALAN M. FREEDMAN*
**Counsel of Record*
CAROL R. HEISE
LAURENCE E. KOMP
GARY PRICHARD
MICHAEL J. BENZA
Midwest Center for Justice, Ltd.
831 Main Street
Evanston, IL 60202
Phone: (847) 492-1563
Fax: (847) 492-1861
Counsel for Respondent

David Pehlke and Christopher Kopacz, third-year law students, assisted in the research of this brief.

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APR 11 2005

No. 04-637

In The Supreme Court Of The United States

MARGARET BRADSHAW, Warden,

Petitioner,

v.

JOHN DAVID STUMPF,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
**Counsel of Record*
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
FRANKLIN E. CRAWFORD
Assistant Solicitors
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

A. Stumpf's guilty plea was voluntary and intelligent under *Henderson v. Morgan*, 426 U.S. 637 (1976) 3

1. *Henderson* creates a strong, but rebuttable, presumption of regularity 3

2. The record here does not show that Stumpf was confused about the elements of his crime 4

3. Stumpf has failed to provide compelling extrinsic evidence of lack of explanation 7

B. Stumpf was not deprived of due process when he was convicted based on his guilty plea, and sentenced to death, for the aggravated murder of Mary Jane Stout 9

1. The prosecutor did not undermine the fairness of Stumpf's proceedings 9

2. Stumpf cannot rely on the "duty to correct" to escape his conviction 14

Page

3. The prosecutor did not secure "inconsistent" convictions 15

4. Stumpf has not made out a viable "actual innocence" claim 18

C. The Sixth Circuit did not separately vacate Stumpf's sentence, so reinstating the conviction automatically reinstates the sentence 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Alcorta v. Texas,
355 U.S. 28 (1957) 14

Allen v. Mullin,
368 F.3d 1220 (10th Cir. 2004) 8

Bousley v. United States,
523 U.S. 614 (1998) 17

Brady v. Maryland,
373 U.S. 83 (1963) 10, 11, 14

Clemons v. Mississippi,
494 U.S. 738 (1990) 15

Darden v. Wainwright,
477 U.S. 168 (1986) 13

Green v. Georgia,
442 U.S. 95 (1979) 11

Henderson v. Morgan,
426 U.S. 637 (1976) 3, 4, 7, 8

Herrera v. Collins,
506 U.S. 390 (1993) 18, 19

Johnson v. Mississippi,
486 U.S. 578 (1988) 15

Page

Marshall v. Lonberger,
459 U.S. 422 (1983) 8

Miller v. Pate,
386 U.S. 1 (1967) 10

Mooney v. Holohan,
294 U.S. 103 (1935) 14

Napue v. Illinois,
360 U.S. 264 (1959) 10, 11, 14

Nash v. Israel,
707 F.2d 298 (7th Cir. 1983) 4

In re Sakarias,
35 Cal. 4th 140 (2005) 10, 11

Sawyer v. Whitley,
505 U.S. 333 (1992) 18

Schlup v. Delo,
513 U.S. 298 (1995) 17

Smith v. Groose,
205 F.3d 1045 (8th Cir. 2000) 10

Thompson v. Calderon,
120 F.3d 1045 (9th Cir. 1997) 12, 13

U.S. Dep't of Labor v. Triplett,
494 U.S. 715 (1990) 11

Page

United States v. Ruiz,
536 U.S. 622 (2002) 10

In re Washington,
691 N.E.2d 285 (Ohio 1998) 5

Statutes

Ohio Rev. Code § 2929.04(A) 16
Ohio Rev. Code § 2929.04(A)(3) 6
Ohio Rev. Code § 2929.04(B)(6) 5

INTRODUCTION

The Warden's opening brief showed that the Sixth Circuit relied on a flawed understanding of the law, both in holding that Stumpf's plea was not knowing and voluntary, and in finding a due process violation. The record here shows that Stumpf and his partner Wesley robbed and brutally shot Mr. and Mrs. Stout, grievously wounding him and killing her. Stumpf's conviction for aggravated murder, based on his guilty plea, did not violate the Constitution.

First, Stumpf's guilty plea was valid because the record shows that he understood the deal he was making, and his brief establishes no basis for relieving him of the consequences of that plea. In fact, Stumpf acknowledges that the plea colloquy creates an "initial presumption" that his plea was knowing and voluntary, imposing a "significant burden" for him to overcome. Stumpf Br. at 22, 24. Stumpf asserts that the State attempts to make this presumption irrebuttable, *id.* at 22, but that is simply not true. Stumpf's claim fails not because the presumption is irrebuttable, but rather because he points to no evidence rebutting it.

Stumpf asserts that his claim at the plea hearing that he was not the shooter shows that his plea must have been uninformed. But that is not so. In deciding to plead, Stumpf knew that the prosecutor could show that Stumpf had specific intent, either as the actual shooter or as a willing participant. The evidence included (1) that Stumpf had participated in the robbery, (2) that Stumpf had held the Stouts at gunpoint, (3) that Stumpf shot Mr. Stout in the head twice, (4) that Mrs. Stout was shot almost immediately after Mr. Stout with the same weapon (i.e., with Stumpf's gun), and (5) that Stumpf had the gun after Mrs. Stout was shot. Thus, it made perfect sense for Stumpf to plead guilty (thereby reducing his chances for a capital sentence), notwithstanding his claim that it was Wesley, not Stumpf, who pulled the trigger. And contrary to Stumpf's argument, accepting the plea deal does not show an "abiding, obvious and uncorrected

misunderstanding" of the elements of aggravated murder. *Id.* at 21. Indeed, striking the plea on this record, as the court below did, renders the presumption of regularity virtually meaningless, a result that portends disaster for the finality of the thousands of state court convictions based on such pleas.

Stumpf's due process claim fares no better. He contends that the State had a duty to "correct" his conviction and sentence after the State presented "newly-discovered evidence" at Stumpf's co-defendant's later trial. *Id.* at 1, 3, 15. But that contention finds no support in the Court's due process jurisprudence. First, the State's presentation of evidence at Stumpf's co-defendant's later trial was not "inconsistent" with Stumpf's own admission of guilt in his plea. Second, the State has provided Stumpf sufficient process on this issue. He has litigated it in three separate state forums—each of which was aware of all of the "new evidence." He simply lost on his claim. Nor is this a case, like those Stumpf relies upon, see *id.* at 31, where the prosecutor knowingly used false evidence to obtain a conviction. No one disputes that at every stage of Stumpf's proceedings the prosecutor has fully disclosed to both Stumpf and the courts all relevant evidence.

At the end of the day, Stumpf's "due process claim" is really some sort of "actual innocence claim." That is, he claims he is entitled to withdraw his plea because, in his view, new evidence from Wesley's trial shows he is not guilty of aggravated murder. But even aside from the legal problems with that claim, it is simply not true as a matter of fact. The evidence provides ample support for Stumpf's plea. Stumpf bases his innocence on his assertion that he was not even in the house when Mrs. Stout was shot. See Stumpf Br. at 1, 43. But all three available witnesses deny this: Wesley says Stumpf was the shooter, Mr. Stout says he heard two male voices immediately before he heard the four gunshots that killed his wife, and Wesley's cellmate, Eastman, while naming Wesley as the shooter, places Stumpf there when the

shooting occurred. Thus, Stumpf has not shown a due process violation.

Finally, Stumpf's assertion that the Warden "does not address the Sixth Circuit's grant of *habeas* relief on the due process claim as to Stumpf's death sentence," Stumpf Br. at at 15, 44, is simply wrong. His argument rests on the flawed premise that the Sixth Circuit separately vacated the conviction and the sentence, but the court below did not. Rather, the Sixth Circuit vacated the conviction, and, *as a result of that*, the sentence also fell. That is, the Sixth Circuit did not send Stumpf back for new sentencing (the result if it would have vacated his sentence), but rather for a new trial. Thus, if the Court reinstates his conviction, as it should, the lower court's opinion provides no independent basis for declining to reinstate his sentence as well.

ARGUMENT

A. Stumpf's guilty plea was voluntary and intelligent under *Henderson v. Morgan*, 426 U.S. 637 (1976).

Stumpf appears to agree with the Warden that, under *Henderson v. Morgan*, 426 U.S. at 647, a strong presumption of regularity arises from the record of a plea hearing where a defendant is represented by counsel. See Stumpf Br. at 24. The parties disagree primarily on the type and quality of evidence necessary to overcome that presumption. Stumpf asserts that the record creates "pervasive and deep" doubt about his plea. *Id.* That argument, however, relies largely on mischaracterizations of both the record evidence and Ohio law. Once those are addressed, the record actually reinforces the presumption of regularity, dooming his claim here.

1. *Henderson* creates a strong, but rebuttable, presumption of regularity.

Stumpf acknowledges that under *Henderson* the plea colloquy here creates an "initial presumption," see Stumpf

Br. at 22, that Stumpf's plea was knowing and voluntary. And he admits that the presumption imposes a "significant burden" for him to overcome. *Id.* at 24. In fact, he essentially concedes that the plea must stand if there is any "principled means" of supporting it in the plea record. *Id.* at 24.

At the same time, however, Stumpf mischaracterizes the Warden's *Henderson* argument. He incorrectly contends that the Warden reads *Henderson*, 426 U.S. at 647, as "com[ing] close to an irrebuttable presumption" of voluntariness from the defendant's and his counsels' on-the-record representations that counsel properly advised the defendant. Stumpf Br. at 22. In fact, far from relying on an "irrebuttable presumption," the Warden merely argues that the presumption of voluntariness that arose from Stumpf's and his counsels' statements is not rebutted by the supposed "confusion" that the Sixth Circuit "discovered" on the plea hearing record. Indeed, if the record here fails to support a plea, then *Henderson*'s presumption is a presumption in name only—a result the Court should not countenance.

The Warden agrees that a guilty plea hearing record in some cases may, as Stumpf suggests, show "pervasive and deep" doubt about whether the defendant's plea was knowing and voluntary. See Stumpf Br. at 24. For example, in *Nash v. Israel*, 707 F.2d 298, 302–03 (7th Cir. 1983), the defendant told the judge on the record that he did not understand the charge to which he was pleading guilty, even though his attorney had explained it to him. The court of appeals correctly held that the judge's failure to explain the charge to the defendant after the latter had stated, point blank, that he did not understand it, rendered the plea unknowing. But the record here falls far short of meeting that standard.

2. The record here does not show that Stumpf was confused about the elements of his crime.

Stumpf's argument that the plea hearing itself shows that his plea was unknowing and involuntary dances around

both the facts and Ohio's criminal law. For example, Stumpf asserts that "[t]he only proof of intent offered at Stumpf's plea hearing . . . was the conclusion that Stumpf had been the principal offender." Stumpf Br. at 13. But as the Warden's opening brief more fully describes, that is not the case. The factual basis hearing included evidence that Stumpf robbed the Stouts, that he held the Stouts at gunpoint, that he shot Mr. Stout twice in the head, that the same gun was used to shoot both Mr. and Mrs. Stout, and that, immediately before Mrs. Stout's shooting occurred, Mr. Stout heard two male voices talking. See Ohio Br. at 11–12.

What Stumpf's argument also fails to address is that, under Ohio law, circumstantial evidence—such as the defendant's active participation in a robbery using a weapon under circumstances showing a reckless disregard for human life—is sufficient to support a finding of specific intent. See *In re Washington*, 691 N.E.2d 285, 287 (Ohio 1998) (When "the prosecution seeks to prove intent to kill by establishing the defendant's participation in planning and executing a robbery, the factfinder may infer the defendant's intent to kill and may base its finding of intent to kill solely on that inference."). Thus, ample evidence showed that Stumpf specifically intended Mrs. Stout's death, whether as the actual shooter or as an aider and abettor; and either role is sufficient to support his conviction for aggravated murder.

Nor was Stumpf's guilty plea inconsistent with his desire, expressed at the plea hearing, to argue that he was not the shooter. If he could show that he was not, it would be a mitigating factor reducing his likelihood of a capital sentence. See Ohio Rev. Code § 2929.04(B)(6). So, as the dissenting judge below noted, Stumpf was necessarily cautious about ensuring that he would be able to present his story. And, consistent with this, the state court did not understand Stumpf's plea as an admission that he was the shooter. Rather, the court allowed Stumpf to argue, in mitigation, that he was not. To be sure, the court rejected that

argument, but not on the grounds that Stumpf had already admitted his role by pleading guilty.

Simply put, Stumpf was entirely reasonable when he decided to plead guilty with the understanding that he would try to convince the sentencing court that he was not the triggerman, and thus should receive a more lenient sentence. Ohio Br. at 26–27. His actions thus do not reflect any "confusion" about the nature of the offense to which he was pleading guilty. Stumpf Br. at 24–27. Accordingly, his decision to plead affords no basis to infer that Stumpf had not been informed of the elements of the offense.

Nor does Stumpf's attempt to link his plea to the prosecutor's "theory" of Stumpf's guilt—that Stumpf was the triggerman—do anything to advance his cause. In response to the Warden's argument that Stumpf was convicted of a "crime," not a "theory," see Ohio Br. at 33, Stumpf asserts that, once the plea was accepted, the prosecutor's "'theory' became the 'crime.'" Stumpf Br. at 19. And he separately asserts that the "theory" was also the "bulk of the evidence" of specific intent. *Id.* at 15. Stumpf unsurprisingly cites no case authority, and to our knowledge none exists, for the remarkable propositions that theories or arguments somehow become evidence or convictions. Stumpf was convicted of aggravated murder with a specification that the victim was killed for the purpose of "escaping detection, apprehension, trial, or punishment for another offense." Ohio Rev. Code § 2929.04(A)(3). As outlined above, a sufficient factual basis exists to support that conviction here. Stumpf was not, his protestations notwithstanding, "convicted of" being a "principal offender." See Stumpf Br. at 20. Indeed, the State dropped the felony-murder specification—the only one for which a principal-offender finding would have been required—as part of the plea agreement. J.A. 131–32.

Nor does Stumpf's "low, but normal, intelligence," Pet. App. 240a, invalidate his plea. Stumpf Br. at 28. At worst,

Stumpf had a "low average" intelligence, D. Ct. Op. at 41 (Feb. 7, 2001), and not the "unusually low mental capacity" that warranted the *Henderson* Court's conclusion that the guilty plea was involuntary, 426 U.S. at 647. In short, nothing in the state trial court record overcomes Stumpf's "significant burden."

3. Stumpf has failed to provide compelling extrinsic evidence of lack of explanation.

Having failed to substantiate his claim with record evidence, Stumpf also fails to present competent, compelling evidence to contradict his and his lawyers' on-the-record representations that his counsel advised him of the elements of the offense to which he pleaded guilty. See Ohio Br. at 31–32. Contrary to Stumpf's suggestion, the "numerous affidavits from those with any knowledge of Stumpf's legal representation and plea decision" in the "2600 pages" of the Sixth Circuit Joint Appendix do not show that his plea was unknowing or involuntary. See Stumpf Br. at 23. Affidavits from Stumpf's family members and social workers do not state that they were present during all of Stumpf's conferences with his attorneys. Those affidavits thus lack foundation for any opinion that Stump's counsel did not explain the crime to him. See, e.g., J.A. 312, Affidavit of Lesa Wood, sister of John Stumpf at ¶ 5 ("John told me that his attorney was not really explaining things."); Affidavit of Debbie Starkey (social worker), R. 13, Ex. D. to Ex. KK (state post-conviction review petition) at ¶ 19, (based on her limited interaction with Stumpf and his counsel, it would "not surprise" her "that [Stumpf] did not understand why, or to what he plead[ed] guilty"). Indeed, Stumpf's own affidavit does not state that his lawyers failed to explain the elements. J.A. 302 at ¶ 13. Instead, his years-after-the-fact affidavit expresses only that he thought he would not get the death penalty, notwithstanding the judge's express statement at the plea hearing that he remained death-eligible. See J.A. 302, Stumpf Affidavit at ¶¶ 9, 11; J.A. 139, 141–42, 145 (plea

hearing). Not even the Sixth Circuit believed that this misunderstanding sufficed to show that Stumpf's plea was unknowing. See Pet. App. 31a n.6.

Henderson itself appeared to involve the testimony of the defendant's attorneys regarding their advice to their client. See 426 U.S. at 642 (district court based its factual finding that Morgan's plea was involuntary on its statement that "[t]he lawyers gave respondent advice about the different sentences which could be imposed for the different offenses, but . . . did not explain the required element of intent."). Of course, the most competent, credible evidence of what the lawyer did and did not tell his client would be the lawyer's own testimony. Cf. *Allen v. Mullin*, 368 F.3d 1220, 1233, 1240–43 (10th Cir. 2004) (court reviewed testimony of defendant's counsel regarding her conferences with her client in assessing defendant's claim that his plea was unknowing); *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (a court applying *Henderson* veers "wide of the mark" by relying solely on a defendant's after-the-fact testimony and by requiring the State to produce contrary evidence).

Nor does the Sixth Circuit's view that Stumpf's counsel's performance at the plea hearing fell "outside the 'range of competence' to which the defendant is entitled," Pet. App. 32a, support its conclusion that Stumpf's plea was unknowing. Stumpf Br. at 27. As the Sixth Circuit noted, Stumpf did not even make an independent "ineffective assistance of counsel" claim based on the plea hearing. See Pet. App. 12a.[1] And the Sixth Circuit's criticism of defense counsel's performance was based on the Sixth Circuit's misunderstanding of Ohio law and misapprehension of the

[1] In the Sixth Circuit, Stumpf also abandoned his claim that appellate counsel was ineffective. See Pet. App. 10a. That claim had included an argument that his appellate counsel was ineffective for not raising as error the trial court's failure to explain the charge to Stump when he pleaded guilty. See J.A. 74–75 (district court opinion).

reasonable bases for Stumpf's decision to plead guilty. See also Ohio Br. at 22–27, 32–34.

Finally, Stumpf's suggestion that the evidence the State presented at Wesley's later trial undermined the voluntariness of Stumpf's earlier guilty plea is just wrong. Stumpf Br. at 28. Stumpf does not, and cannot, explain how newly-discovered evidence presented in a later proceeding would somehow show that Stumpf's conduct at his earlier plea hearing reflected a lack of understanding of the charges.

In sum, the Sixth Circuit's conclusion that Stumpf's guilty plea was unknowing and involuntary is unsupported by the law and incorrect on the facts, and should be reversed.

B. Stumpf was not deprived of due process when he was convicted based on his guilty plea, and sentenced to death, for the aggravated murder of Mary Jane Stout.

Stumpf's due process claim also fails. An "inconsistent theories" due process claim requires some showing that the prosecutor's conduct has materially undermined the reliability of a trial or proceeding. Stumpf cannot clear that hurdle here. Nor can Stumpf show that the prosecutor here secured inconsistent convictions. Stumpf and Wesley are both criminally liable for aggravated murder, so their convictions are not inconsistent. At bottom, Stumpf's due process claim is really an "actual innocence" claim in disguise, but he cannot succeed on that claim.

1. The prosecutor did not undermine the fairness of Stumpf's proceedings.

An "inconsistent theories" due process claim must rest on a showing either that the prosecutor engaged in bad faith conduct—such as presenting perjured testimony—or that he withheld exculpatory evidence or impeachment evidence from the defendant. Our confidence in the trial process rests on the belief that a full and fair adversarial representation is

the best procedural mechanism for ascertaining the truth. When a prosecutor withholds material evidence or knowingly presents false testimony, he compromises the reliability of that system, thereby depriving the defendant of due process.

So, for example, Stumpf cites a variety of cases involving prosecutors who knowingly presented perjured testimony or false evidence, or withheld material exculpatory information from a defendant. See Stumpf Br. at 31 (citing e.g., *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (knowing reliance on false testimony); *Miller v. Pate*, 386 U.S. 1, 6 (1967) (knowing use of false evidence); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression of material exculpatory evidence)). But cf. *United States v. Ruiz*, 536 U.S. 622, 629–30 (2002) (suggesting that *Brady* is only a trial right).

Concerns about prosecutorial manipulation of the record similarly drove the courts in other cases on which Stumpf relies, such as *Smith v. Groose*, 205 F.3d 1045, 1051–52 (8th Cir. 2000), *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997) (*en banc*), *rev'd on other grounds*, 523 U.S. 538 (1998), and *In re Sakarias*, 35 Cal. 4th 140 (2005). In *Smith*, the prosecutor relied on two different stories from the same witness, and both stories existed before either trial began. See *Smith*, 205 F.3d at 1050–51. In *Thompson*, the prosecutor presented one story from a group of jailhouse informants at a joint preliminary hearing for both defendants, then switched to a materially inconsistent story from a different group of jailhouse informants at Thompson's trial. The prosecutor then called witnesses at the co-defendant's later trial that the prosecutor had objected to in Thompson's earlier trial. See 120 F.3d at 1055–59. And in *Sakarias*, the prosecutor presented the same expert witness at two separate trials, but elicited different testimony designed to change the jury's perception of when and where the death occurred in order to bolster his case against each of the two defendants. See 35 Cal. 4th at 162.

The problem with Stumpf's due process claim is that he has failed to show any such process failure here. Indeed, the *Sakarias* court expressly noted that the prosecutor's "manipulation" of the evidence in that case made it very different from Stumpf's. See *id.* at 162, n. 6 ("Unlike Ipsen's conduct in Sakarias's trial, therefore, Stumpf's prosecutor 'did not manipulate evidence.'") (citation omitted). The California court's distinction was correct. Unlike the prosecutors in the cases Stumpf cites, the prosecutor here did not withhold material information, and he did not present perjured testimony or knowingly use false evidence at Stumpf's plea or sentencing hearings. The evidence that Stumpf complains about simply did not exist when Stumpf pleaded.

Nor did the prosecutor "withhold" Wesley's and Eastman's later trial testimony from Stumpf. *Brady*, 373 U.S at 87. Indeed, the prosecutor stipulated to admitting the transcript of Eastman's and Wesley's testimony at the hearing on Stumpf's later motion to vacate his plea. See J.A. 204–05 (hearing on Stumpf's motion to vacate plea); Pet. App. 280a (entry denying motion to vacate plea); cf. *Green v. Georgia*, 442 U.S. 95, 96–97 (1979) (prosecutor apparently objected to introduction of testimony of a witness who had testified at a co-defendant's earlier, separate trial; the Court ruled that the state court's exclusion of the testimony from the sentencing phase of Green's trial denied him due process). Thus, the concerns with the fairness of a defendant's trial that animate cases like *Napue* and *Brady* do not arise with regard to Stumpf's conviction and sentence.

The prosecutor's conduct at Wesley's trial similarly provides no support for Stumpf's due process claim. First, Stumpf lacks standing to complain about the way the prosecutor conducted Wesley's trial. This case does not fall within that narrow category of cases that allow a litigant to assert the due process rights of another. See *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720–22 (1990). And in any

event, evidence presented at Wesley's later trial could not invalidate Stumpf's earlier conviction based *on Stumpf's guilty plea*. Ohio Br. at 35–39.

Even apart from those flaws, the prosecutor's conduct at Wesley's trial did not violate due process. The prosecutor did not present perjured testimony or "false" evidence there. Eastman's testimony was not "false" for due process purposes simply because the defense counsel at Wesley's trial attacked Eastman's credibility.

Nor is Stumpf correct to assert that the prosecutor's willingness to put on Eastman's testimony means that the testimony must be treated as indisputably accurate. See Stumpf Br. at 34–35. To be sure, a prosecutor cannot put on testimony that he knows to be false. But that does not mean that a prosecutor can use only testimony that is unassailably true. Rather, where impeachment evidence exists, the prosecutor's obligation is to make that evidence available to defense counsel, and then let the fact finder make the ultimate determination of veracity. The prosecutor did exactly that with Eastman's testimony. He thus did not violate due process in leaving it to Wesley's jury to determine whether Wesley was the shooter (as Eastman testified) or only an accomplice (as Wesley testified). Eastman's testimony, which was not available at the time of Stumpf's plea and sentencing hearing, is simply one piece of evidence that Wesley's jury was entitled to consider (and reject if it chose), and that the prosecutor was entitled to present. Nor did the prosecutor violate due process by arguing in Stumpf's case—after turning the Eastman evidence over to Stumpf—that there was still sufficient evidence to support Stumpf's conviction and sentence.

Stumpf's complaint about the prosecutor's allegedly inconsistent "theory" in Wesley's case fares no better when evaluated under the Court's cases dealing with improper prosecutorial argument. See Stumpf Br. at 29–31 (claiming

Stumpf's due process rights were violated when State convicted and sentenced him based on a "factual theory" the State later repudiated). To the extent this argument rests on judicial estoppel principles, it is not at all clear that such principles do, or should, apply to the government in criminal cases. See *Thompson*, 120 F.3d at 1070 (Kozinski, J., dissenting) (citing cases). In any event, such principles would not help Stumpf, the *first* convicted defendant. Moreover, the Court's cases dealing with improper prosecutorial argument underscore that due process is offended only when a prosecutor's improper remarks so infect the proceeding as to deprive the defendant of a fair trial. See, e.g., *Darden v. Wainwright*, 477 U.S. 168, 181–82 (1986). That did not occur here. Throughout Stumpf's case, the prosecutor has fully disclosed all available evidence, and, as discussed below, he did not use that evidence to secure inconsistent convictions.[2]

Nor can Stumpf show a lack of process. He asserts he was entitled to a "due process inquiry to ensure that the result of his proceeding is a correct and just one." Stumpf Br. at 35. He has received not only one such "inquiry," but three. Stumpf litigated the newly-discovered evidence issue in the trial court, an intermediate court of appeals, and the Ohio Supreme Court. See Ohio Br. at 14–15. And each of these courts was fully apprised of all available evidence, including Eastman's testimony at Wesley's trial. All three courts considered the full evidence, including the "newly discovered evidence," and confirmed that Stumpf's conviction and sentence were proper. While Stumpf is understandably disappointed with those outcomes, he cannot credibly contend that he did not receive sufficient process.

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[2] Similarly, Stumpf cannot advance his due process claim against the prosecutor by relying on how *Wesley's counsel* used Stumpf's plea in *Wesley's trial*. See Stumpf Br. at 45–46. It is the prosecutor, not Wesley's counsel, who is bound by due process constraints.

Due process entitles Stumpf to fair proceedings in a fair tribunal with disclosure of all exculpatory evidence and a record that does not contain evidence known to be false. Stumpf received that here—three times over.

2. Stumpf cannot rely on the "duty to correct" to escape his conviction.

Stumpf also broadly asserts that a prosecutor has a "duty to correct" a conviction and sentence whose underlying "theory" was inconsistent with a later conviction and sentence of another defendant. See Stumpf Br. at 16 ("The prosecutor's materially inconsistent position at Wesley's trial necessarily rendered Stumpf's plea and sentence unreliable. The failure to correct this inconsistency violated Stumpf's due process rights."); *id.* at 29 ("Due process requires that a defendant's conviction and sentence be re-evaluated when the prosecutor has repudiated the theory and evidence used to secure the original conviction and sentence."). But here, contrary to Stumpf's argument, the prosecutor has not "repudiated" Stumpf's conviction or the evidence supporting it, see *id.* at 29, 35, and certainly did not "deem" Stumpf's conviction "false." *id.* at 33. Use of newly-discovered evidence at a later trial does not "render unreliable" the conviction, based on a guilty plea, of the first defendant. *Id.* at 16.

The Court has recognized a prosecutorial duty to correct, but that duty is limited to informing the court or opposing counsel when false information has been presented. See *Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935); *Napue*, 360 U.S. at 269; *Alcorta v. Texas*, 355 U.S. 28, 30–31 (1957) (prosecutor did not disclose impeachment evidence and failed to correct trial testimony prosecutor knew to be misleading). That duty is a far cry from the one Stumpf asks the Court to create here. Nor does the prosecutor's duty not to withhold material exculpatory or impeachment evidence from the defense *before trial*, see *Brady*, 387 U.S. at 87,

establish a "duty to correct" an earlier conviction and sentence, issued before the evidence even existed.

Neither does *Johnson v. Mississippi*, 486 U.S. 578 (1988), support Stumpf's novel "duty to correct" claim. See Stumpf Br. at 34. In *Johnson*, the Court remanded the case to the state appellate court to consider whether the death sentence could stand despite the trial court's partial reliance, as an aggravating factor, on a prior conviction that had later been ruled invalid. First, the reliance on Johnson's prior conviction—later held to be a nullity—as an aggravating factor in Johnson's *own* sentencing hearing bears no resemblance to the facts here, where the prosecutor used newly discovered evidence in a co-defendant's later, separate trial. Second, the trial court here had before it the newly discovered evidence when it considered (and denied) Stumpf's motion to vacate his plea or sentence. Further, the Ohio Supreme Court independently considered the appropriateness of Stumpf's conviction and sentence on the record as a whole, including the new evidence from Wesley and Eastman. The State Supreme Court agreed with the trial and appellate courts that Stumpf's death sentence was appropriate even in light of the new evidence. Pet. App. 173a–74a (state court considered new evidence in regard to mitigating factors upon reweighing). Cf. *Clemons v. Mississippi*, 494 U.S. 738, 744–45 (1990) (even when sentencing court relies on an invalid aggravating factor, the state appellate court may cure the error by reweighing the aggravating and mitigating factors without the invalid aggravating factor). In short, Stumpf cannot rely on a "duty to correct" to undo his conviction, based on his plea.

3. The prosecutor did not secure "inconsistent" convictions.

This case does not involve a situation where the State has convicted two defendants for a crime only one could have committed. As noted above, Ohio law permits more

than one person to be convicted of aggravated murder, and to be eligible for a capital sentence, based on a single killing. Not only the "actual killer," but anyone who participated in the killing, and acted with the necessary intent, is criminally liable for the death. See above at 5. And many of the aggravating specifications that make a defendant eligible for capital punishment do not turn on whether or not the defendant was the actual shooter. See Ohio Rev. Code § 2929.04(A).

Under Ohio law Stumpf's and Wesley's convictions and sentences are entirely consistent with each other. The record contains overwhelming evidence that both were material participants in Mrs. Stout's murder, and that each acted with the necessary intent, independent of which one pulled the trigger. Indeed, in his closing at Wesley's trial, the prosecutor explicitly argued that the jury could find Wesley guilty based either on the conclusion that he was the triggerman, or on the conclusion that he helped Stumpf. J.A. 278–85. Similarly, in opposing Stumpf's attempt to vacate his plea, the prosecutor again relied on the fact that Stumpf was guilty independent of his precise role. J.A. 126. Equally important, the death specification on which Stumpf pleaded guilty did not require a showing that Stumpf was the shooter. His aggravating factor turned on the *reason* for which Mrs. Stout was killed—i.e., to escape detection for another crime—rather than on whether Stumpf pulled the trigger. Thus, Stumpf cannot establish any inconsistency.

Moreover, Stumpf's due process claim also fails because the "new evidence" presented at Wesley's trial would not have materially helped Stumpf with regard to his conviction or sentence. Stumpf Br. at 41–49. The "new evidence" includes testimony that hurts Stumpf—Wesley, the only other eyewitness to the shooting, testified that Stumpf killed Mrs. Stout. See Wesley Trial Tr. 2780–88 (Dist. Ct. R. 33). Moreover, while Eastman named Wesley as the shooter, his testimony still placed Stumpf right there when the

shooting occurred. See J.A. 241.[3] Thus, no one corroborates Stumpf's claim that he was out of the house during the shooting. See Stumpf Br. at 43 (citing Stumpf Sentencing Hr'g at 502 (D. Ct. R. 13)). Accordingly, even if the prosecutor did something wrong—and he did not—the testimony at Wesley's trial did not create a reasonable likelihood that Stumpf would not have been convicted or received a death sentence, even assuming that were the standard for such a claim. Stumpf Br. at 47.[4]

Further, the state trial court that heard Stumpf's motion to vacate his plea or sentence had before it the transcripts of Eastman's and Wesley's testimony at Wesley's trial, but it did not vacate Stumpf's sentence or conviction. See above at 11. This belies Stumpf's contention that "if a reasonable sentencing panel had learned of Eastman's testimony, the evidence would have demonstrated at best that Stumpf was an aider and abettor to Mrs. Stout's murder," and that Stumpf would not have received a death sentence. Stumpf Br. at 47.

The Ohio Court of Appeals similarly declined to vacate Stumpf's plea or sentence on the basis of the Eastman and Wesley trial testimony, finding "no evidentiary basis for relieving [Stumpf] of his plea." Pet. App. 181a–83a, 201a–04a. The Ohio Supreme Court agreed that Eastman's testimony added "insufficient mitigating weight" to affect the

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[3] Eastman testified: "Stumpf panicked, dropped the gun and Wesley picked up the gun and shot the lady. After he shot the lady I guess *they* was getting the rest of the stuff *they* was taking out of the house, *they* was going downstairs getting ready to leave. As *they* was turning to leave I guess *they* heard her moan or say something and then he [Wesley] said [Wesley] turned around and shot her again." (emphasis added).

[4] In fact, as discussed below, Stumpf's claim is really an actual innocence claim. Even if such a claim exists, it should be judged, at the very least, under the *Schlup v. Delo*, 513 U.S. 298 (1995), standard. See Ohio. Br. at 42–45. Stumpf's claim fails that test as well. He cannot show that, in light of all the evidence, it is "more likely than not" that no reasonable trier of fact would have convicted him. *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quotation omitted).

balancing of the mitigating factors against the aggravating circumstance to which Stumpf pleaded guilty. Pet. App. 171a–74a.[5]

In sum, the two convictions are consistent, so Stumpf's due process claim must fail.

4. Stumpf has not made out a viable "actual innocence" claim.

Stumpf's due process claim is really an actual innocence claim in disguise, but he cannot press that claim here. Actual innocence is not a free-standing habeas claim. Rather it is a gateway that allows the Court to consider an otherwise-barred constitutional claim on the merits. See *Herrera v. Collins*, 506 U.S. 390, 404 (1993). Stumpf has no such claim here. And even if actual innocence were a free-standing claim, Stumpf could not show that he was "actually innocent." See Ohio. Br. at 44–45. As noted above, and as three Ohio courts have found, overwhelming evidence supports his plea and his conviction.

Moreover, as the Court noted in *Sawyer v. Whitley*, 505 U.S. 333, 347 (1992), in proving "actual innocence," with regard to the death penalty, the defendant must "focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence." The newly-discovered evidence here goes solely to whether or not Stumpf was the shooter, which had nothing to do with the aggravating circumstance (i.e., killing a witness) to which he

[5] Contrary to Stumpf's implication, the Ohio Supreme Court did not reject Eastman's testimony because it was "hearsay." Stumpf Br. at 45, n.11. Instead, that court merely noted that Eastman's testimony was entitled to little weight, not only because it was hearsay, but because of the other evidence at Stumpf's sentencing hearing regarding Stumpf's involvement in the crime. Pet. App. 171a–72a (finding no error in trial court's determination that Eastman's testimony did not require that Stumpf's plea or sentence be set aside); see also Pet. App. 173a (finding that Eastman's testimony has minimal credibility).

pleaded guilty. As the new evidence was relevant only to mitigation, he cannot rely on it to support an "actual innocence" claim.

The evidence supports Stumpf's plea and conviction for aggravated murder, and the Sixth Circuit erred in determining otherwise.

C. The Sixth Circuit did not separately vacate Stumpf's sentence, so reinstating the conviction automatically reinstates the sentence.

Stumpf's mistaken claim that the Warden does not challenge the Sixth Circuit's actions in vacating Stumpf's death sentence rests on a flawed premise. Stumpf Br. at 15, 44. He fails to recognize that the Sixth Circuit did not separately vacate Stumpf's sentence apart from vacating his conviction. The court's language is directed toward the prosecutor's action in securing the *convictions*, not the sentences. That is, the court found that Stumpf's rights were violated by the prosecutor's use "of inconsistent, irreconcilable theories *to convict* both him and his accomplice" and it thus remanded for *retrial*, not resentencing. Pet. App. 48a (emphasis added); see also Pet. App. 3a ("Stumpf's due process rights were violated by the state's deliberate action *in securing convictions of both Stumpf and Wesley* for the same crime, using inconsistent theories.") (emphasis added). In short, the Sixth Circuit vacated Stumpf's *conviction*, and solely as a result of that, Stumpf's sentence also fell.

That is not to say that a federal court cannot, in appropriate circumstances, vacate a death sentence on habeas. See, e.g., *Herrera*, 506 U.S. at 403 ("The typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner, or in a capital case a similar conditional order vacating the death sentence."). But the Sixth Circuit did not do so, and would not have been correct to do so, here.

In any event, the State's arguments as to why Stumpf's due process claim fails apply equally to his death sentence as to his conviction. Thus, if this Court reinstates Stumpf's conviction, as it should, the Sixth Circuit opinion gives no independent basis for not reinstating his sentence as well.

CONCLUSION

For the above reasons and those in the Warden's merit brief, the Court should reverse the judgment below.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
**Counsel of Record*
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
FRANKLIN E. CRAWFORD
Assistant Solicitors
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioner

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MARGARET BRADSHAW, Warden
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v.
JOHN DAVID STUMPF,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the
Sixth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

JOSHUA L. DRATEL
Of Counsel
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS
245 Fifth Ave., 19th Floor
New York, N.Y. 10016
(212) 532-4434

ELLEN S. PODGOR*
Georgia State University
College of Law
140 Decatur Street
Atlanta, Georgia 30303
(404) 651-2087
*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT

A Prosecutor's Use of Inconsistent Arguments for the Same Crime in Different Trials Violates the Due Process Clause of the Fourteenth Amendment 3

A. The Same Prosecutor Who Uses Inconsistent Arguments for the Same Crime Deprives the Accused of "Fundamental Fairness" in the Judicial Process 3

B. A Prosecutor's Use of Inconsistent Theories for the Culpability of More than One Defendant for the Same Crime Violates Due Process Because It Disregards the Prosecutor's Duty to Seek Justice and Truth 7

C. Due Process Necessitates Reliability at Sentencing, Which is Precluded When the Government Advances Irreconcilable Inconsistent Theories for More than One Defendant for the Same Crime 9

CONCLUSION 12

TABLE OF AUTHORITIES

CASES **Pages**

Alcorta v. Texas, 355 U.S. 28, 31 (1957) 10
Banks v. Dretke, 540 U.S. 668 (2004) 10
Berger v. United States, 295 U.S. 78, 88 (1935) 3, 8
Brady v. Maryland, 373 U.S. 83, 87 (1963) 5, 10
Caldwell v. Mississippi, 472 U.S. 320 (1985) 5, 10
Crawford v. Washington, 541 U.S. 36,
124 S.Ct. 1354, 1374 (2004) 11
Drake v. Kemp, 762 F.2d 1449, 1479 (11th Cir. 1985) 7
Giglio v. United States, 405 U.S. 150 (1972) 4, 5
Giles v. Maryland, 386 U.S. 66, 98 (1967) 8
Green v. Georgia, 442 U.S. 95 (1979) 5
Gregg v. Georgia, 428 U.S. 153, 190 (1976) 10
In re Sakarias, 2005 WL 486783 *13 (March 3, 2005) 7
In Re Winship, 397 U.S. 358, 369 (1970) 3
Miller v. Pate, 386 U.S. 1 (1967) 5
Mooney v. Holohan, 294 U.S. 103 (1935) 4
Morine v. Burdine, 475 U.S. 412, 467 (1986) 11
Napue v. Illinois, 360 U.S. 264 (1959) 4
State v. Sha, 292 Minn. 182, 185 (1972) 8
Stumpf v. Mitchell, 367 F.3d 594, 611 (6th Cir. 2004) .. 6, 7
Thompson v. Calderon, 120 F.3d 1045, 1059
(8th Cir. 2000) 7
United States v. Jaramillo, 69 F.3d 388 (9th Cir. 1995) ... 6
United States v. Kattar 840 F.2d 118, 127 (1st Cir. 1988) . 7
United States v. Lovasco, 431 U.S. 783, 790 (1977) 3
United States v. Wade, 388 U.S. 218, 256 (1967) 4
Wiggins v. Smith, 539 U.S. 510 (2003) 10
Woodson v. North Carolina, 428 U.S. 280 (1976) 11

STATUTE **Pages**

18 U.S.C. § 1623 6

MISCELLANEOUS **Pages**

ABA Model Rules of Professional Conduct,
Rule 1.6 (2003) 9
Rule 3.1 (2003) 9
Rule 3.3 (2003) 8
Rule 3.3, Comments 2, 5 (2003) 8, 9
Rule 3.8, Comment 1 (1983) 7, 9
ABA Standards for Criminal Justice,
Prosecution Function § 3-1.2 (1992) 7
Prosecution Function § 3-2.8 (1992) 9
Prosecution Function § 3-5.6 (1992) 9
Prosecution Function § 3-6.1 (1992) 9
ABA Model Code of Professional Responsibility
EC 7-13 (1981) 8
Ohio Rules of Court: Code of Professional Responsibility
EC 7-13 (2002) 8

Bennett L. Gershman, *The Prosecutor's Duty to the Truth*,
14 GEO. J. LEGAL ETHICS 309 (2001) 7, 8
Bruce A. Green, *Why Should Prosecutor's "Seek Justice,"*
26 FORDHAM URB. L.J. 607, 612 - 619 (1999) 7
Anne Bowen Poulin, *Prosecutorial Inconsistency,*
Estoppel, and Due Process: Making the Prosecution
Get Its Story Straight, 89 CAL. L. REV. 1423 (2001) .. 4
Restatement (Third) of the Law Governing
Lawyers § 97(3) (2000) 8

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 12,200 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure fairness and the proper administration of criminal justice. One of its particular concerns is to ensure due process for persons accused of crime. Due process mandates that prosecutors proceed with fairness in the pursuit of justice.

SUMMARY OF ARGUMENT

A prosecutor who presents "flip-flopping" theories concerning the same crime deprives an accused of "fundamental fairness," an essential ingredient of the due process clause of the Fourteenth Amendment. This deprivation

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

is exacerbated when the *same* prosecutor argues inconsistently as to the identity of a single triggerman in a *death penalty* case. The egregiousness of this conduct is also heightened when the statements are not being made to an identical factfinder who might be able to evaluate the credibility of these different positions.

Prosecutors have a unique role in the judicial process. They represent the interests of the sovereign, and thus, have a heightened responsibility to ensure that fairness is achieved and a defendant's due process rights are protected. This cannot be accomplished when prosecutorial veracity is ignored. Both case law and ethical mandates provide a measure for determining appropriate lines of fairness. When a prosecutor points one finger at two different individuals as the culpable party in a single triggerman case, the inconsistency presented severely breaches accepted norms of prosecutorial fairness and is offensive to providing integrity in the judicial process.

Due process mandates that a sentence be fair and reliable in any given case. That protection is amplified in capital cases because of the readily cognizable difference in the nature of a death sentence as compared to any other sentence. To punish two individuals based upon statements that can be accurate as to only one of them, flies in the face of sentencing reliability.

ARGUMENT

A Prosecutor's Use of Inconsistent Arguments for the Same Crime in Different Trials Violates the Due Process Clause of the Fourteenth Amendment

A. The Same Prosecutor Who Uses Inconsistent Arguments for the Same Crime Deprives the Accused of "Fundamental Fairness" in the Judicial Process

Due process protects the accused from actions that violate "those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." *United States v. Lovasco,* 431 U.S. 783, 790 (1977) (citations omitted). The requirement of "fundamental fairness" is a core value "embodied in the Due Process Clause of the Fourteenth Amendment." *In Re Winship*, 397 U.S. 358, 369 (1970) (Harlan J., concurring).

Prosecutors serve a unique role in assuring that an accused receives "fair play and decency" in the judicial process. As opposed to being "an ordinary party to a controversy," it is the prosecutor who serves as a critical "representative" of the "sovereignty," which has the "obligation to govern impartially." *Berger v. United States*, 295 U.S. 78, 88 (1935). "In a criminal prosecution," the prosecutor's role "is not that it shall win a case, but that justice shall be done." *Id.* "It is as much his [or her] duty to refrain from improper methods calculated to

produce a wrongful conviction as it is *to use every legitimate means to bring about a just one.*" *Id.* (emphasis added).[2]

This Court has recognized an array of improper prosecutorial conduct as depriving a defendant of "fundamental fairness" in the criminal process. Specifically, the jurisprudence of this Court prohibits the presentation of, or failure to correct, false testimony, and the presentation of improper argument by the prosecutor. *See generally* Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CAL. L. REV. 1423 (2001). These two limitations on prosecutors demonstrate a clear recognition that "fundamental fairness" cannot be achieved when a prosecutor fails to offer reliable evidence or makes statements that misrepresent the truth.

Prosecutors violate due process by presenting material testimony that is false, by presenting material testimony that creates a false impression, or allowing such testimony to stand uncorrected. *See, e.g., Mooney v. Holohan*, 294 U.S. 103 (1935) (presenting knowingly false testimony violates due process); *Giglio v. United States*, 405 U.S. 150 (1972) (failing to correct false testimony violates due process); *Napue v. Illinois*, 360 U.S. 264 (1959) (failing to correct testimony that creates a false impression, though not perjured, violates due process). This is true even where the particular prosecutor does not know that the testimony being presented is false. *See Giglio v. United*

[2] *See also United States v. Wade*, 388 U.S. 218, 256 (1967) (White J., concurring) ("Law enforcement officers have the obligation to convict the guilty and make sure they do not convict the innocent.").

States, 405 U.S. 150 (1972). The reliability of a conviction and its accompanying sentence[3] cannot be assured when a prosecutor engages in conduct that is antithetical to a truthful process. The truthfulness of the process is of the utmost importance even when a specific prosecutor acts in good faith. *Id.* at 153. As this Court stated in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

The importance of prosecutorial veracity, as a core value encompassed within due process, is also demonstrated in decisions by this Court that hold that a prosecutor's improper argument can violate the due process rights of a defendant. *Miller v. Pate*, 386 U.S. 1 (1967) (finding that a deliberate misrepresentation of truth to a jury is a violation of due process); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (finding an uncorrected, misleading statement of law to a jury a violation of due process).

Collectively, the improper argument and false testimony decisions of this Court set a clear standard for the proposition that uncorrected false statements by a prosecutor create an unacceptably high risk to the integrity of the judicial process. A false statement by the prosecutor, while not evidence, can still be sufficient to violate the due process rights of the defendant. Inconsistent statements by a prosecutor falls within this same class of improprieties because it demeans the reliability of the

[3] Due process requires fairness not only for the trial phase of a case, but also for sentencing. *See Green v. Georgia*, 442 U.S. 95 (1979).

judicial process.[4] Mutually exclusive prosecutorial theories advanced against co-defendants in separate trials are every bit as much of a threat to the "fundamental fairness" of the criminal process as false testimony, and are, essentially, tantamount to improper argument and the introduction of false evidence.

The holding by the Sixth Circuit majority of this case, that it violates due process for a prosecutor to advance inconsistent irreconcilable theories, is not an aberration, as other jurisdictions have endorsed this position. *See Stumpf v. Mitchell*, 367 F.3d 594, 611 (6th Cir. 2004) (discussing sister circuits that have held the same or similar conduct a violation of due process). In endorsing the position of two prior decisions, the lower court stated:

> The prosecutor's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice...The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for the truth.

[4] The disdain for inconsistent statements in the judicial process is seen in another setting which makes it a federal crime to offer inconsistent declarations in certain circumstances. *See United States v. Jaramillo*, 69 F.3d 388 (9th Cir. 1995) (discussing inconsistent statements within the scope of 18 U.S.C. § 1623).

Id. at 612-613 (citing *Thompson v. Calderon*, 120 F.3d 1045, 1059 (8th Cir. 2000); quoting *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring)).

B. A Prosecutor's Use of Inconsistent Theories for the Culpability of More than One Defendant for the Same Crime Violates Due Process Because It Disregards the Prosecutor's Duty to Seek Justice and Truth

The Supreme Court of California recently held a prosecutor's use of inconsistent and irreconcilable theories was a due process violation. The Court noted how this prosecutorial conduct is "inconsistent with the principles of public prosecution." *In re Sakarias*, 2005 WL 486783 *13 (March 3, 2005). The *Sakarias* Court states that "[a] criminal prosecutor's function 'is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial.'" *Id.* at *13. (quoting *United States v. Kattar* 840 F.2d 118, 127 (1st Cir. 1988)).

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." ABA Model Rules of Professional Conduct, Rule 3.8 Comment 1 (1983), *see also* ABA Standards for Criminal Justice, Prosecution Function § 3-1.2 (1992). This prosecutorial duty is founded in both ethical[5]

[5] The prosecutor's duty to "seek justice" is well grounded in legal literature. *See* Bruce A. Green, *Why Should Prosecutor's "Seek Justice,"* 26 FORDHAM URB. L.J. 607, 612 - 619 (1999) (providing a historical outline of the prosecutor's duty to "seek justice"); Bennett L. Gershman,

and legal standards. The concept stems from the idea that a prosecutor is a representative of the sovereign whose obligation it is to govern impartially. *Berger v. U.S.* 295 U.S. 78, 88 (1935). As a representative of the sovereign, the prosecutor has a duty to use restraint and prosecute cases fairly. ABA Model Code of Professional Responsibility EC 7-13 (1981); Ohio Rules of Court: Code of Professional Responsibility EC 7-13 (2002).[6]

Prosecutors, as "ministers of justice," have the obligation to seek truth. As stated in *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J. concurring), "[t]he State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment." Regardless of the evidence against the accused, a prosecutor has an overriding duty of fairness. *State v. Sha*, 292 Minn. 182, 185 (1972).

Prosecutors have obligations beyond those of most lawyers, who are clearly prohibited from knowingly making false statements of fact to the court (ABA Model Rules of Professional Conduct, Rule 3.3 (2003)), and are prohibited from allowing false evidence to be presented that misleads the court. (ABA Model Rules of Professional Conduct, Rule 3.3

The Prosecutor's Duty to the Truth, 14 GEO. J. LEGAL ETHICS 309 (2001).

[6] Unlike lawyers in private practice, "a prosecutor or similar lawyer determining whether to file criminal proceedings or take other steps in such proceedings, must do so only when based on probable cause and the lawyer's belief, formed after due investigation, that there are good factual and legal grounds to support the step taken." Restatement (Third) of the Law Governing Lawyers § 97(3) (2000).

Comments 2, 5 (2003)). Not only are lawyers prohibited from bringing forward evidence that may appear to be false, but they must have a basis in fact for any actions they bring or defend. ABA Model Rules of Professional Conduct, Rule 3.1 (2003). Unlike defense counsel who may have obligations of confidentiality to a client, (ABA Model Rules of Professional Conduct, Rule 1.6 (2003)), and constitutional mandates that are provided to an accused, the prosecutor serves as the representative of the sovereign.

A prosecutor's duty is to make sure that defendants' rights are protected and that convictions are based on sufficient evidence. ABA Model Rules of Professional Conduct, Rule 3.8 Comment 1 (2003). It is specifically reiterated in the prosecutor's functions that the prosecutor is not to misrepresent facts to the court (ABA Standards for Criminal Justice, Prosecution Function § 3-2.8 (1992)) and is to seek the withdrawal of false evidence upon its discovery. (ABA Standards for Criminal Justice, Prosecution Function § 3-5.6 (1992)). When prosecutors are involved in sentencing, they are supposed to ensure that a fair and informed judgment is made by the sentencing authority. ABA Standards for Criminal Justice, Prosecution Function § 3-6.1 (1992).

C. Due Process Necessitates Reliability at Sentencing Which is Precluded When the Government Advances Irreconcilable Inconsistent Theories for More than One Defendant for the Same Crime

Punishment premised upon inconsistent prosecutorial theories fails to provide accuracy in sentencing, an essential

aspect of assuring constitutional compliance with due process. This is particularly important when the sentence is death.

"[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). "It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an *informed* manner." *Id.* at 189. (emphasis added). This Court has held that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* This principle of "guided discretion," intended to produce accuracy in sentencing, is thwarted when a prosecutor is allowed to present factually inconsistent theories of a crime.

Prosecutorial misleading is constitutionally impermissible irrespective of whether the conduct occurs at trial or at sentencing.[7] *See Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985); *see also Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (finding a due process violation when a prosecutor uses testimony that gives a "false impression" that may affect the imposition of a death sentence). Comments that improperly mislead a factfinder at the sentencing phase of a death case fail to provide reliability. In light of the often unchecked role served by prosecutors in the criminal justice process, it is necessary for this Court to speak definitively in prohibiting conduct that

[7] *See also Wiggins v. Smith*, 539 U.S. 510 (2003) (finding ineffective assistance of counsel due to failures *solely* in the sentencing phase); *Banks v. Dretke*, 540 U.S. 668 (2004) (applying prosecutor's duty to disclose *Brady* material in the context of sentencing).

demeans reliability. *See Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1374 (2004) (finding that confrontation was "the only indicium of reliability sufficient to satisfy constitutional demands").

In *Woodson v. North Carolina*, 428 U.S. 280 (1976), this Court explained why, particularly in capital cases, there is a greater need for reliability in the sentencing decision:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that *qualitative difference*, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

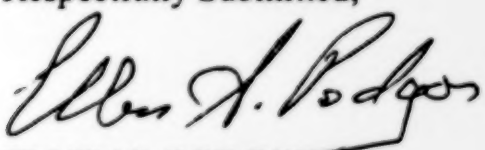
Id. at 305 (emphasis added).

Woodson underscores the precedential importance that this Court places on maintaining procedural safeguards in capital cases. When a prosecutor is allowed to present inconsistent and irreconcilable theories of culpability in successive proceedings, there is a heightened risk that an arbitrary sentencing decision will be reached. "[D]ue process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections." *Morine v. Burdine*, 475 U.S. 412, 467 (1986) (Stevens, J., dissenting).

CONCLUSION

For the foregoing reasons, NACDL urges this Court to affirm the judgment of the Court of Appeals.

Respectfully Submitted,



ELLEN S. PODGOR*
Georgia State University
College of Law
140 Decatur Street
Atlanta, Georgia 30303
(404) 651-2087

JOSHUA L. DRATEL
Of Counsel
NATIONAL ASSOCIATION
CRIMINAL DEFENSE LAWYERS
245 Fifth Ave., 19th Floor
New York, N.Y. 10016
(212) 532-4434

* Counsel of Record

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[8] The following law students assisted in the research of this brief: Stewart Bratcher, Alireza Paul Ghanouni, Heather Suzanne Robinson.